Supreme Court of the United States

OCTOBER TERM, 1962

No. 735

UNITED STATES, APPELLANT

vs.

RALPH L. SAMPSON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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[fol. 1]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 22385

UNITED STATES OF AMERICA

vs.

RALPH L. SAMPSON, LEONARD MILLER, HERBERT RUTTENBERG, MARTIN RYE, U. T. THOMPSON, CHARLES McCARTHY, JOHN STEELE, WALTER A. ARATA, PAUL C. BROOKS, DAVID B. GRAY, GEORGE K. GREER, ED GUETTEL, WESLEY M. ISBELL, CHRIS E. JENSEN, DAVID A. LANDERS, RAY L. PREWITT, BERT ROLAND, FRANK SIERSMA, BURR F. SPRAGUE, WILLIAM M. WALLEN, WARD WILLIAMS, E. L. WILSON, E. S. WOHRLE, LENDERS SERVICE CORPORATION

INDICTMENT—Filed in Open Court April 29, 1960

THE GRAND JURY CHARGES:

COUNT ONE

That, beginning prior to March 9, 1956, and continuing until June 1, 1959, the defendants

RALPH L. SAMPSON
LEONARD MILLER
HERBERT RUTTENBERG
MARTIN RYE
U. T. THOMPSON
CHARLES McCARTHY
[fol. 2] JOHN STEELE
WALTER A. ARATA
PAUL C. BROOKS
DAVID B. GRAY
GEORGE K. GREER
ED GUETTEL
WESLEY M. ISBELL

CHRIS E. JENSEN
DAVID A. LANDERS
RAY L. PREWITT
BERT ROLAND
FRANK SIERSMA
BURR F. SPRAGUE
WILLIAM M. WALLEN
WARD WILLIAMS
E. L. WILSON
E. S. WOHRLE
LENDERS SERVICE, CORPORATION,

a corporation devised and intended to devise a scheme and artifice to defraud Chester J. French, Roger E. Barefield, Clarence R. Smith, O. K. Livingston, Joe W. Collins, Mrs. Doris Severns, Mrs. Bernice Gadow, George M. Moody, A. N. Modrall, Joe Helms, Ray D. Humphrey, W. E. Jeffords, Sr., E. J. Murphy, W. L. Albritton, J. A. Pullen, W. H. Carithers, R. M. Garris, Pearl Q. Brewer, Alvin L. Klotz, N. A. Coffey, Walter M. Harmon, Jr., L. W. Addy, Mattie S. Bailey, Leroy Smith, H. L. Hayworth, Mrs. Jeanette Curtis, Joseph E. Saliba, R. O. Stephenson, A. W. Tarpley, James W. Boyette, Jr., John L. Stanley, Jr., John P. Jackson, Carroll L. Fulmer, W. C. Bradbury, William Tate, Milton V. Herstis, Mildred J. Gafford, J. E. Claggett, C. E. English, Mason L. Hollcroft, John Baldwin, R. A. Baures, [fol. 3] W. H. Drewell, J. J. Robinson, Arthur Springer, William H. Sanders and numerous and divers other persons throughout the United States, who were owners or operators or connected with the operation of businesses who were desirous of selling their businesses or of obtaining business loans, and who could be induced to reply to advertising disseminated by the defendants, in the names of Charles Ford & Associates, Inc., Business Mart of America, Inc. and Lenders Service Corporation, and to obtain money and property from said persons hereinafter called "victims" by numerous false and fraudulent pretenses, representations and promises, well knowing that said pretenses, representations and promisses would be and were false when made.

1. That, at all times during and throughout the period of operation of the said scheme, the defendants Ralph Sampson, Herbert Ruttenberg and Leonard Miller were the organizers, main executives and directors of said scheme.

2. That, at all times throughout the operation of said scheme the defendant Martin Rye was a participant therein and was at times engaged as a salesman and at times was in charge of the Atlanta office, and at times held the title of Administrative Director in Lenders Service Corporation.

3. That, during the operation of said scheme, the defendant Charles McCarthy acted as a regional director of the Atlanta, Georgia, office of the defendants, and for a time as an instructor for the sales department of said sheme.

4. That, during the operation of said scheme, the defendant John Steele acted as a regional director of the [fol. 4] Atlanta, Georgia, office of the defendants, and in the same capacity in other offices of the defendants.

5. That, during the operation of said scheme, the defendant U. T. Thompson held the official title of executive Vice President of Lenders Service Corporation.

6. That, during the operation of said scheme, the defendants Walter A. Arata, Paul C. Brooks, David B. Gray, George K. Greer, Ed Guettel, Wesley M. Isbell, Chris E. Jensen, David A. Landers, Ray L. Prewitt, Bert Roland, Frank Siersma, Burr F. Sprague, William M. Wallen, Ward Williams, E. L. Wilson and E. S. Wohrle acted as salesmen for the said scheme and artifice, and operated from the Atlanta, Georgia, regional office of the defendants.

7. That, the defendant Lenders Service Corporation acted from the time of its incorporation on December 18, 1957, as one of the corporate entities in the name of which said scheme was carried on.

And the Grand Jurors further charge:

A. It was a part of said scheme and artifice to defraud that the defendants would and did form a series of corporations in whose names the scheme would be and was carried on, said corporations being known as Charles Ford

& Associates, Inc., Business Mart of America, Inc., hereinafter also referred to as BMA, and Lenders Service Corporation, hereinafter also referred to as LSC. It was a part of said scheme and artifice to defraud that the defendants would and did, while operating under and using the names of Charles Ford & Associates, Inc. and BMA, seek as victims businessmen desiring to sell their businesses, and to make to such victims numerous false [fol. 5] and fraudulent pretenses, representations and promises relating to the ability and intention of the defendants to sell or help to sell said victims' businesses. It was a part of said scheme and artifice to defraud that the defendants would and did, while operating under and using the name of LSC, seek as victims businessmen desiring to obtain business loans, and to make to such victims numerous false and fraudulent pretenses, representations and promises relating to the ability and intention of the defendants to make, secure, or help to secure business loans for said victims.

B. It was a part of said scheme and artifice to defraud that the defendants would and did distribute, send and display through newspapers, magazines, direct mailings and direct display by the salesmen numerous advertisements and promotional documents, all of which contained numerous false and fraudulent statements, pretenses and representations which the defendants then and there well knew and intended to be false and fraudulent when made.

C. It was a further part of the said scheme and artifice to defraud that the defendants would secure salesmen by the placing of newspaper advertisements seeking ex-book salesmen and other persons without experience in the money-lending field to work for the defendants and to become a part of the said scheme and to seek to attract salesmen who would be agreeable to the use of unethical sales talks and hire and use them as field representatives, and it was a further part of the scheme to teach such salesmen that prospective victims were at a complete disadvantage and would jump and act like puppets if the salesman handled the client right, and to teach them to try and impress upon the victims that said salesman was [fol. 6] an expert; to teach salesmen to try and confuse

victims and to lead them into believing that LSC was a lending company; to teach said salesmen to accept loan applications or applications for LSC's purported services even though they know there is little or no chance for a loan to be made; and to teach said salesmen that LSC and the defendants did not care how such salesmen sold a contract to a victim and that it was perfectly all right for a salesman to use innuendos and half-truths and, further, for said salesmen to be taught that if a victim asks a question as to the return of his fee if the loan is not made to reply: "Why did you bring that up? Is there something you didn't tell me? What worries you about this business? What have you been hiding?", rather than to answer the question truthfully; and it was a further part of the scheme to encourage and teach the field representatives to answer questions by asking other questions and to fail to answer questions put to them by victims, and to be evasive in answering questions of the said victims and to encourage them to pretend to the victims that they were loan officers; and to represent and encourage the field representatives to represent LSC as being the Mayo Clinic for businessmen; to represent that, if it were at all possible for a businessman to obtain a loan, LSC could arrange for such a loan; pretend to be surprised when it was brought to attention of LSC that a victim had not received his loan; lead victim to believe a closs association and working arrangement existed between LSC and commercial finance companies by referring to various finance companies as "our lenders"; convince a victim that the loan could be made in less time if the client's check was certified.

D. It was a further part of said scheme and artifice to [fol. 7] defraud that upon receipt of a reply from a business establishment or owner responding to the inquiry of the defendants, one of the defendant salesmen would visit personally the owner of the business and others for the purpose of inducing them to enter into contracts with the defendants and with the defendant corporations, said contracts purportedly relating to the sale of their business establishments or building, as to the victims contacted under the names of Charles Ford & Associates, Inc. and

Business Mart of America, Inc., and said contracts purportedly relating to the obtaining of a loan for said business man in connection with his business as to the victims contacted under the name of LSC and to induce said owner and victim to agree to pay and to pay a fee to the defendants in advance of any action or promised action being taken thereof by the defendants, and it was a further part of the said scheme to defraud that in the action of the said salesmen in seeking to so induce the victims and in presenting the purported advantages of such action on their part to the victims that the said salesmen would and did act toward and talk to the said victims in the manner in which they had been instructed as alleged in Paragraph C hereof, and that said salesmen would and did make numerous false and fraudulent statements, pretenses and promises and representations which they and the other defendants knew to be false and fraudulent.

E. It was a further part of the said scheme and artifice to defraud that the said salesmen when contacting business-owner victims under the names of Charles Ford & Associates, Inc. and Business Mart of America, Inc. would inquire the price which the owners desired to obtain for the business and when told the price would induce the [fol. 8] owner to name a substantially higher price and would state and describe the services to be rendered by Charles Ford & Associates, Inc. and by Business Mart of America, Inc. to accomplish sales of the business; and that the salesmen when contacting victims under the name of LSC would inquire as to the amount of loan which the victim business-owner desired to obtain and, when told the amount of the loan, would on numerous occasions induce the owner to seek a substantially higher loan; and it was a further part of the said scheme and artifice to defraud that the salesmen through false and fraudulent representations would induce the victim to sign a document purporting to be an application for the services of Business Mart of America, Charles Ford & Associates, Inc. or Lenders Service Corporation, said documents being called financial service agreements, although, as well known to the salesmen and to the defend-

ants and to all of them, the terms of said document were contrary to the oral representations made by the salesmen to the victims; it was a further part of this phase of the said scheme and artifice to defraud that the salesmen would induce the victims to pay to the salesmen an advance fee for the purported services which they led the victim to believe were to be performed by the defendants and that after a salesman had obtained the check and left the place of business of the victim he would immediatiately take the same to the bank upon which drawn to have the same converted into a Cashier's Check, and that the salesmen would have with them a rubber stamp provided by the regional managers and other defendants, which rubber stamp was used on the back of the victim's check and designated that the check was approved to be certified; and it was a further part of said scheme and [fol. 9] artifice to defraud that the defendants would not perform the services orally represented by the salesmen and otherwise represented by the defendants through their advertising and literature to said victims in that they would not sell the businesses of the victims, they would not procure buyers for the business of said victims, and would not bring such buyers into contact with the victims, nor do any action which was intended to be helpful in obtaining buyers for the businesses of the victims, and that they would not and did not obtain loans for the victims nor make loans for the victims nor try to obtain nor make loans for the victims nor do any action which was intended to be helpful in obtaining loans for the victims.

F. It was a further part of said scheme and artifice to defraud:

1. That the defendants would represent to each victim that he would get a refund of his advance fee if his application for services were not accepted at one of the regional offices of the defendants, and that if the same were accepted and the fee kept by the defendants, the defendants had approved said application and would perform the valuable services which they had falsely and fraudulently represented to said victim that they would perform. That when said applications for services were

transmitted, together with the check for the fee, to said regional offices, it was a part of the scheme that the defendants would accept all of said applications and deposit all of said fees in the defendants' bank account, without any regard for the financial condition of said victim insofar as it concerned his ability to obtain a loan, and without any study, appraisal or evaluation of said victim's eligibility for a loan from any source whatsoever, [fol. 10] or the likelihood or possibility of the sale of his business to any source whatsoever.

2. That the defendants would accept at their regional office all applications from victims, when accompanied by a good check for the fee, and that such acceptance would consist of the regional director or one of his office clerks or secretaries signing his name at the bottom of said application, and depositing the victim's check in the defendants' bank account. That the defendants would not reject any applications except in some instances those which had not been signed by the victims, or in connection with which the victims had stopped payment on their checks before the defendants had an opportunity to cash them, and in some instances in which the full amount of the advance fee had not been received from a victim.

3. That following the said acceptance of the victims' applications the defendants would mail to said victims a signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform. That a further purpose thereof was to inform said victims that they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound thereby and had no recourse for retrieving his money.

4. That the defendants would compile in a rudimentary form the financial data which had been obtained from said victim and prepare documents called business [fol. 11] and financial reports, which would then be sent to a few lending agencies. That such reports were sent

without any regard to or attempt at correlation between the type, size and location of the loan sought and the type and size of loan handled by said lending agencies. That the defendants, for the purpose of further lulling said victims would write to said victims, advising them of the sending out of said business and financial reports to the said lending agencies, in order to attempt to convince the victims that they had not been defrauded, and that the defendants were performing valuable and meaningful services on their behalves.

5. That upon receipt of the complaints of victims as to the false and fraudulent statements and promises which had been made to them by the defendants, and particularly by the salesmen or field representatives, the defendants would pretend to investigate said complaints, and would encourage the said field representatives to deny having made such statements and representations, and would write letters to the victims who made such complaints, stating to them that the salesman denied making such statements and representations, and that, therefore, it was impossible to refund the fee in such case.

6. That the defendants would reject the complaints of victims and refuse refunds of money demanded by the victims, giving as a reason the false and fraudulent representation that the written application for services executed by the victims defined the exact services to be rendered by the defendants and that the salesmen or field representatives were without authority to vary the terms of the application for services. That the aforesaid refusals to refund money would be accompanied by statements and letters seeking to induce the said victims to believe [fol. 12] that the defendants had performed and would perform valuable services for said victims, which said statements and representations were false and fraudulent, as the defendants then and there well knew and intended.

G. It was a further part of said scheme and artifice to defraud that the defendants would and did, through the medium of the oral representations of the salesmen and the aforesaid literature and publications and advertising prepared and distributed by the defendants, make and intend to make numerous false and fraudulent pretenses

representations and promises, which were known to and intended by the defendants to be false and fraudulent when made, to wit:

That the purpose of LSC was to assist small business in obtaining financing from accredited sources; that LSC would help secure loans and funds for business owners and operators; that LSC would secure loans for business owners and operators; that LSC would make loans to business owners and operators; that LSC would perform services for an applicant which would help him obtain a loan; that LSC would perform services for an applicant which would enable him to obtain a loan; that Field Representatives of LSC were qualified to evaluate businesses, evaluate financial requirements and possibilities of obtaining loans for prospective applicants and to advise said applicants financially and as to the chance of their obtaining a loan; that LSC would make business loans; that most LSC applicants obtained their loans; that loans would be made available to LSC applicants within stated periods, such as three weeks, five weeks, six weeks, eight weeks; that LSC made money available to firms on a business loan basis; that LSC could help a [fol. 13] company obtain long term financing in amounts from $5,000 to $500,000; that LSC was the representative of many commercial finance companies and had authority to speak for the said finance companies; that LSC field representatives had authority to state to applicants interest rates, financing terms, length of time for which the loan would run, and repayment schedule of loans; that LSC would provide an immediate answer regarding the possibility of securing additional cash for a business; that LSC served the nation's lending institutions; that LSC would carefully choose a lending source to which a loan application would be referred; that business and financial reports were distributed to selected commercial finance companies for their consideration; that LSC would submit loan applications to finance companies in the area in which said finance companies operated; that LSC would submit business and financial reports to lending institutions whose business it was to make loans of the type and in the amount being sought; that interest on loans

would be at the rate of 4½ percent, 5 percent, 5½ percent, 6 percent, or some other stated figure; that field representatives were specially trained; that the LSC field representative would not accept a loan application or a fee unless he was satisfied the applicant would obtain his loan; that field representatives were qualified to determine whether an applicant would likely receive his loan; that LSC employed qualified field representatives to interview owners or officers of firms who have contacted LSC; that LSC field representatives were qualified to fully describe the services of LSC and to discuss the various types of financing which may apply to the particular situation; that the regional office of LSC would not accept a fee or a loan application until and unless the said regional [fol. 14] office was satisfied the applicant would obtain his loan; that regional officials of LSC were qualified to determine and would determine whether a client would obtain financing; that personnel who were trained and qualified in the field of commercial lending at the regional office would make a detailed examination of a request for financing and would evaluate the same as to whether a loan would or could be obtained before accepting the financial service agreement on behalf of LSC; that if the financial service agreement were accepted by LSC the applicant was likely to get or would probably get a loan; that if the financial service agreement were accepted by LSC, the applicant would get a loan; that if the financial service agreement were accepted by LSC, LSC would make a loan to the applicant; that LSC would not cash a client's check until and unless it was determined the client would obtain his loan; that each regional office of LSC was staffed with an experienced financial officer; that the advance fee collected at the time of signing a financial service agreement would be refunded if the applicant did not obtain his loan; that the fee collected at the time of signing a financial service agreement would be refunded if the applicant paying the same did not qualify for a loan; that LSC was an integrated service geared to assist the nation's small business firms in their financial requirements; that LSC functions as a small business financial consultant; that LSC per-

forms a specialized business and financial consulting service; that LSC in behalf of commercial lending companies offers a current and complete business and financial report of prospective applicants; that LSC provided a valuable specialized service to all participants in its program; that LSC was staffed with personnel capable of analyzing financial statements and business data so as to [fol. 15] present in expert form the financial requirements of a client; that financial and personal statements of clients were analyzed by a large staff of skilled personnel employed by LSC; that business and financial reports would be sent to as many finance companies as necessary in order to obtain a loan for a client; that LSC had on its staff a former official of the Small Business Administration; that LSC employed trained personnel at both regional and home office headquarters in various departments necessary to process each phase of service to the individual client; that LSC used modern methods and specialized treatment so as to afford clients a thorough and comprehensive service; that LSC specialized in the financial problems of the small business man; that LSC had agreements with lending institutions by virtue of which said lending institutions would lend money to qualified applicants of LSC; that an additional fee would be due LSC from an applicant after the sought loan was granted or obtained; that LSC had established meaningful standards in the loan field which had been met by certain commercial finance companies, referred to in LSC's literature as "accredited lenders"; that Charles Ford & Associates, Inc. and BMA had lists of persons who wanted to buy certain types of business property; that they had ready buyers who would quickly purchase business property offered through BMA; that they would assist a man in selling his business without delay; that fees collected incident to the signing of a BMA contract would be refunded if the business was not sold in a specified time; that they sold a great many business properties for clients; that BMA was a real estate brokerage house; that BMA salesmen were experts in the real estate field; that BMA had buyer prospects for various types of business; that BMA used Remington Rand tabulating

[fol. 16] equipment to match seller and buyer; that BMA employed qualified personnel as field representatives who were capable of examining a business, appraising it, and gathering information which would lead to the sale of the said business; that the defendants would perform services of a value proportional to the amount of fee collected in each instance; that the defendants would perform more services and services of a greater value when the amount of loan or sales price sought was large than when it was small; that the schedules of advance fees prepared and used by the defendants were based upon the cost to the defendants and the value to the victims of the services which would be performed by said defendants in connection with a loan or business sale in the amounts set forth in said schedules; that the acceptance of applications for services by the defendants' regional offices meant approval of said applications and meant that the victim whose application was accepted was qualified to receive a loan and would receive a loan; that acceptance by the regional office of a victim's financial service agreement was synonymous with approval of a loan application by a bank; that the primary purpose of Lenders Service Corporation was to assist small business in obtaining financing from accredited sources; that the services of Lenders Service Corporation complement existing financial facilities available in the commercial lending field; that Lenders Service Corporation performed services in behalf of small business firms by evaluating financial data submitted by such business firms and submitting it to selected sources for funds and to sources which were carefully chosen to provide each applicant with the proper type and method of financial assistance; that a valuable specialized service would be provided to all participants with a minimum of time and cost; that [fol. 17] a qualified field representative would personally interview the owners or officers of each firm who had contacted Lenders Service Corporation; that it was the responsibility of such field representative to fully describe the services of Lenders Service Corporation to such owners or officers; that the financial information obtained from such business men by field representatives would

be distributed to selected commercial finance companies for their consideration; that Lenders Service Corporation would provide a valuable service for the best interest of both the finance companies and small business firms; that Lenders Service Corporation employed specially trained personnel in each phase of their operation; that it was the purpose of Lenders Service Corporation to work closely with banks, finance companies and other accredited financial sources, and to send to such sources reports of clients of Lenders Service Corporation located in the areas in which these sources operated; and all of said statements, representations and promises, as the defendants well knew, were false and fraudulent, and intended by the defendants so to be, and were made in order to deceive and defraud the persons intended to be defrauded.

H. That, on or about January 6, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to J. E. Claggett, Jr., 1006 N. W. 6th Avenue, Fort Lauderdale, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

[fol. 18] COUNT TWO

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about April 15, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Roger E. Barefield, Magnolia Grocery, 8th Street, S., Waynesboro, Georgia, to be sent and delivered by the Post Office of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THREE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 16, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to C. J. French, Florida Automotive Brake Corp., 327-29 America Street, Orlando, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FOUR

1. The Grand Jurors reallege all of the allegations [fol. 19] of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 13, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Clarence R. Smith, C. R. Smith Supply, 642 W. Church Street, Orlando, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FIVE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about September 4, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to O. K. Livingston, Livingston Auto Sales Com-

pany, Inc., Route 4, Box 229, Andrews Highway, Georgetown, South Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT SIX

1. The Grand Jurors reallege all of the allegations of [fol. 20] Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 29, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Joe W. Collins, Mobile Milling Company, 112 Columbia Street, Chester, South Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT SEVEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 12, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Bernice Gadow, Barbara Karlee Shop, #5 Azalea Park Shop Center, Orlando, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT EIGHT

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

[fol. 21] 2. That, on or about June 11, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Doris E. Severns, Eliece's Dress Shop, 5819 Kuhl Avenue, Orlando, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT NINE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 23, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to George M. Moody, Moody's Pharmacy, U. S. Highway No. 1 and Moody Boulevard, Bunnell, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 27, 1958, in the Atlanta Division of the Northern District of Georgia, for the [fol. 22] purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to W. E. Jeffords, Sr., Palmetto Furniture Company, Florence, South Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT ELEVEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about April 28, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Ray D. Humphrey, Humphrey's Appliance Repair and Exchange, 227 South Wayne Street, Milledgeville, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWELVE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 1, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and at-
[fol. 23] tempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Mr. A. N. Modrall, Lebanon Launderette, 316 North College Street, Lebanon, Tennessee, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 15, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents ad-

dressed to Mr. Joe Helms, Jessup and Helms Realty, 448 North Highway 29, Concord, N. C., to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FOURTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 20, 1958, in the Atlatna Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized [fol. 24] depository for mail matter an envelope and contents addressed to James A. Pullen, East Alabama Supply Co., 801 Noble Street, Anniston, Alabama, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FIFTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about October 13, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Mr. E. J. Murphy, Murphy Bros. Lumber Company, R. R. Newnan Highway, Grantville, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT SIXTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about May 13, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to W. L. Albritton, Albritton Roofing Company, [fol. 25] 4938 - 42nd Avenue, N., St. Petersburg, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT SEVENTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about April 23, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to W. H. Carithers, Carithers Radio & T. V. Service, College Avenue, Jefferson, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT EIGHTEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 21, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Mr. A. L. Klotz, McComb Electric Supply Company, 120 S. Boulevard, McComb, Mississippi, to be sent and delivered by the Post Office Department of the [fol. 26] United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT NINETEEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 21, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to R. M. Garris, Garris Supply, 505 Dickinson Avenue, Greenville, North Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 14, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to P. Q. Brewer, Williams Equipment Company, P. O. Box 375, Quitman, Mississippi, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

[fol. 27] COUNT TWENTY-ONE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about December 3, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents

addressed to N. A. Coffey, N. A. Coffey Company, 214 W. Third Street, Rome, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-TWO

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 17, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Zeb Brevard, Hotel Savoy, 142 - 7th Avenue, N., Nashville, Tennessee, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-THREE

1. The Grand Jurors reallege all of the allegations of [fol. 28] Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 29, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Walter M. Harmon, Jr., Walt's Shell Service, 225 Richland Avenue, E., Aiken, South Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-FOUR

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about August 29, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to L. W. Addy, L. W. Addy Stamp Company, 1127 Park Street, Columbia, South Carolina, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-FIVE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

[fol. 29] 2. That, on or about June 17, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Alvin Kurtz, Alvin Kurtz Plumbing & Heating, P.O. Box F-344, Sarasota, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-SIX

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about December 15, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Mrs. Mattie Seaton, Bailey's Grocery, 420 Hull Street, Jackson, Mississippi, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-SEVEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about May 16, 1959, in the Atlanta Division of the Northern District of Georgia, for the purpose [fol. 30] of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Mr. M. LeRoy Smith, Cawthon Hotel, 25 N. Conception Street, Mobile, Alabama, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-EIGHT

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about October 13, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to H. L. Hayworth, Toccoa Novelty Manufacturing Company, Box 163, Toccoa, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT TWENTY-NINE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 24, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully [fol. 31] and knowingly caused to be placed in an authorized depository for mail matter an envelope and

contents addressed to Mrs. Jeannette Curtis, Jeannette's Restaurant, 307 E. Carroll, Tullahoma, Tennessee, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 18, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to J. E. and A. J. Saliba, Saliba Realty Company, 905 N. Oats Street, Dothan, Alabama, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-ONE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about May 16, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents [fol. 32] addressed to B. O. Stephenson, Southland Motel, P. O. Box 952, Crystal River, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-TWO

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 14, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to A. W. Tarpley, Alglo, Inc., 3500½ Broward Boulevard, Fort Lauderdale, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-THREE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about July 1, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to W. C. Sinclair, Sinclair Food Service, Lebanon Road, Campbellsville, Kentucky, to be sent and de-
[fol. 33] livered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-FOUR

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about May 1, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to John Stanley, Jr., J. L. Stanley Company, 1351 Monarch Road, Atlanta, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-FIVE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about May 12, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Carroll L. Fulmer, Fulmer's Produce Company, 1303½ Columbia Road, Aiken, South Carolina, to be sent and delivered by the Post Office Department of the [fol. 34] United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-SIX

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 13, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to John P. Jackson, Jackson Wheel Alignment, 525 N. Cove Boulevard, Panama City, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-SEVEN

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about April 23, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized

depository for mail matter an envelope and contents addressed to W. C. Bradbury, College Park Manufacturing Company, 1091 Herndon Street, N. W., Atlanta, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

[fol. 35] COUNT THIRTY-EIGHT

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about March 23, 1959, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to William Tate, Grocery Store & Cafe, 121 Lewis Street, Summerville, Georgia, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT THIRTY-NINE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about June 4, 1958, in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and attempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to George Vizenthal, All Miami Appliances, Inc., 2165 W. Flagler, Miami, Florida, to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FORTY

1. The Grand Jurors reallege all of the allegations of [fol. 36] Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about January 25, 1959, in the Atlanta Division of the Northern District of Georgia, the defendants, for the purpose of executing said scheme and artifice, did unlawfully, wilfully and knowingly cause to be placed in an authorized depository for mail matter at Atlanta, Georgia, copies of the Sunday, January 25, 1959, Atlanta Journal-Constitution, a newspaper published in Atlanta, Georgia, the exact quantity being to the Grand Jurors unknown, containing on page 6-C of the classified advertising section a certain advertisement reading as follows:

"SALESMEN
THINKERS
IS WHAT WE WANT
MEN WHO CAN USE
GOD'S GIFT — THE
BRAIN — WITHOUT
GETTING IT
RUPTURED

To these men regardless of background, we offer a golden opportunity to from $15,000 to $30,000 a year on straight commission, work from qualified leads (not just names), interviewing businessmen on the problems of Small Business Finance. Must be over 30, have a car and be free to travel 7-state area. Home weekends. Phone Mr. Steele, TR. 2-0322."

to be sent and delivered by the Post Office of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FORTY-ONE

1. The Grand Jurors reallege all of the allegations of [fol. 37] Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about January 31, 1959, in the Atlanta Division of the Northern District of Georgia, the defendants, for the purpose of executing said scheme and artifice, did unlawfully, wilfully and knowingly cause to be placed in an authorized depository for mail matter

at Atlanta, Georgia, copies of the Saturday, January 31, 1959, Atlanta Journal, a newspaper published in Atlanta, Georgia, the exact quantity being to the Grand Jurors unknown, containing on page 6-C of the classified advertising section a certain advertisement reading as follows:

"BOOK MEN
OVER 30 YEARS OF AGE

We have several ex-bookmen on our staff that are earning from $300 to $600 week on straight commission. Work from qualified confirmed leads (not just names), calling businessmen in 3-4 state area, home weekends, no night work, no cancellations. You keep all you earn. Phone Mr. J. N. Steele, TR. 2-0322."

to be sent and delivered by the Post Office of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FORTY-TWO

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about March 1, 1959, in the Atlanta Division of the Northern District of Georgia, the defendants, for the purpose of executing said scheme and artifice and attempting to do so, did unlawfully, wilfully [fol. 38] and knowingly cause to be delivered by mail, according to the directions thereon, an envelope and contents addressed and directed to Roy and Hefner, 376 Spring Street, N.W., Atlanta, Georgia, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FORTY-THREE

1. The Grand Jurors reallege all of the allegations of Count One of this Indictment, except those contained in paragraph No. H thereof.

2. That, on or about January 27, 1958 in the Atlanta Division of the Northern District of Georgia, for the purpose of executing said scheme and artifice and at-

tempting to do so, the defendants unlawfully, wilfully and knowingly caused to be placed in an authorized depository for mail matter an envelope and contents addressed to Charles E. English, President, English Lumber Company, Inc., Sweeten Creek Road, Asheville, N. C., to be sent and delivered by the Post Office Department of the United States, in violation of Section 1341, Title 18, U.S.C.A.

COUNT FORTY-FOUR

That, beginning on or about March 9, 1956, and continuing until June 1, 1959, in the Atlanta Division of the Northern District of Georgia, the defendants aforesaid did unlawfully, wilfully, and knowingly combine, conspire, confederate, agree and have a tacit understanding with each other and with Jack Allen, A. Wayne Jones, F. J. Weber, Jerry Routman, Lester E. Butler, Thomas N. Clark, Lloyd Ellis, J. B. Miller, James F. Pike, Francis J. Gallagher, and R. L. Higgins, and with a person and persons to the Grand Jurors unknown, who are named [fol. 39] herein as co-conspirators and not as defendants, to commit certain offenses against the United States, that is to say, the use of the mails in furtherance and execution of a scheme and artifice to defraud and for obtaining money and property by means of false pretenses, representations and promises, which said scheme and artifice, false pretenses, representations and promises and use of the mails in furtherance thereof are described and set forth in the previous counts of this indictment; which description of said scheme and artifice is incorporated herein by reference and made a part of this count, as though more fully set forth and described herein, and for the purpose of executing and attempting to execute the said scheme and artifice to defraud, to place and cause to be placed in authorized depositories for mail matter of the United States to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, certain letters, circulars and other written and printed matter, all as charged and alleged in the previous counts of this indictment.

And the Grand Jurors further charge that in furtherance of said unlawful conspiracy and to effect the objects and purposes thereof, said defendants and co-conspirators did and performed numerous overt acts, among which were the following:

1. All of the acts of mailing of letters and documents alleged in the preceding counts of this indictment, on the respective dates and at the places alleged in said counts.

2. On or about March 9, 1956, Ralph Sampson, Herbert Ruttenberg and Leonard Miller formed a corporation [fol. 40] known as Charles Ford & Associates, Inc., a Delaware corporation.

3. On May 1, 1957, Ralph Sampson and Leonard Miller filed a certificate of amendment changing the name of Charles Ford & Associates, Inc. to Business Mart of America, Inc.

4. On December 18, 1957, Ralph Sampson, Herbert Ruttenberg and Leonard Miller formed a corporation known as Lenders Service Corporation, a California corporation.

5. On May 6, 1958, Walter A. Arata had a conversation with Roger E. Barefield in Waynesboro, Georgia, in the course of which he told Barefield that if the latter's application for services was accepted by the Lenders Service Corporation he would get a loan in from six to seven weeks.

6. On August 28, 1956, Paul C. Brooks had a conversation with Joe W. Collins in Chester, South Carolina, in the course of which he told Collins that the payment of an advance fee by a Cashier's Check would expedite the obtaining of a loan by ten to twelve days.

7. On June 10, 1958, David B. Gray had a conversation with Mrs. Doris Severns in Orlando, Florida, and told her that Lenders Service Corporation had obtained many loans and that if her application was approved she would get a loan within six to eight weeks.

8. On April 25, 1958, George K. Greer had a conversation with Ray D. Humphrey in Milledgeville, Georgia, and told him that a loan would be obtained within ninety days.

[fol. 41] 9. On August 14, 1958, Ed Guettel had a conversation with Joe Helms in Concord, North Carolina, and told him that he would obtain a loan within two weeks through the services of Lenders Service Corporation or else would have his fee refunded.

10. On October 9, 1958, Wesley M. Isbell had a conversation with Mr. E. J. Murphy in Grantville, Georgia, and told Mr. Murphy that his fee would be refunded if a loan was not obtained.

11. On April 22, 1958, Chris E. Jensen had a conversation with W. H. Carithers in Jefferson, Georgia, and told Mr. Carithers that a loan would be obtained through the services of Lenders Service Corporation within a maximum of eight weeks.

12. That on or about July 12, 1958, David A. Landers had a conversation with P. Q. Brewer in Quitman, Mississippi, and stated that if the application was accepted a loan would be made.

13. On November 25, 1958, Ray L. Prewitt had a conversation with N. A. Coffey in Rome, Georgia, and stated to Mr. Coffey that Lenders Service Corporation had obtained loans for businesses within ninety days.

14. That, on or about May 25, 1959, Frank Siersma had a conversation with Leroy Smith in Mobile, Alabama, and stated that if Mr. Smith's application was accepted by Lenders Service Corporation that was exactly the same as the money being granted.

15. On October 10, 1958, Burr F. Sprague had a conversation with H. L. Hayworth in Toccoa, Georgia, and stated that Lenders Service Corporation would obtain a loan for Mr. Hayworth in six to seven weeks.

[fol. 42] 16. On June 16, 1958, William L. Wallen had a conversation with Joseph E. Saliba in Dothan, Alabama, and told Mr. Saliba that he could obtain a loan within a couple of weeks through the services of Lenders Service Corporation.

17. On August 14, 1958, Ward Williams had a conversation with Mr. James W. Boyette, Jr. in Smithfield, North Carolina, and told Mr. Boyette that Lenders Service Corporation made loans and that if a loan was not obtained the advance fee would be refunded.

18. On April 30, 1958, E. L. Wilson had a conversation with John M. Stanley, Jr., in Atlanta, Georgia, and stated that if Mr. Stanley's application was accepted by Lenders Service Corporation he would obtain a loan in from thirty to ninety days.

19. On June 1, 1958, E. S. Wohrle had a conversation with Milton V. Herstik in Miami, Florida, and told him that the obtaining or granting of a loan by Lenders Service Corporation was guaranteed or the advance fee would be refunded.

20. On June 16, 1958, Burt Roland had a conversation with Alvin Kurtz in Sarasota, Florida, and stated that Lenders Service Corporation had obtained loans for many business firms and that there was no reason to believe that Mr. Kurtz would not obtain a loan from Lenders Service Corporation.

And the Grand Jurors charge that all of the aforesaid overt acts were committed in furtherance of said conspiracy and to effect the objects and purposes of the same, in violation of Section 371, Title 18, U.S.C.A.

[fol. 43] A True Bill

At Atlanta, Georgia

/s/ Harry B. Horsey, Jr.
Foreman

/s/ Charles D. Read, Jr.
United States Attorney

/s/ John W. Stokes, Jr.
Assistant United States Attorney

[fol. 44]

IN UNITED STATES DISTRICT COURT

MOTION NO. 1

DEFENDANTS' MOTIONS TO DISMISS—
Filed November 10, 1960

Now comes each of the Defendants named above, and separately and severally from other Defendants, makes and files this his or its Motion to Dismiss the Indictment against him or it, and each and every Count of said Indictment, upon the ground that said Indictment taken as a whole, and that each and every Count thereof taken separately, fails to charge an offense against the laws of the United States committed by said Defendant.

Wherefore, each Defendant prays that this his or its Motion be considered by the Court and that the Indictment and each and every Count thereof be dismissed as to him or it.

Of Counsel:
SUTHERLAND, ASBIL & BRENNAN
1516 First National Bank Bldg.
Atlanta, Georgia

BUCHANAN, EDENFIELD & SIZEMORE
C & S National Bank Building
Atlanta, Georgia

NEWELL EDENFIELD
RANDOLPH W. THROWER
MADISON RICHARDSON
D. R. CUMMING, JR.

[fol. 45]

IN UNITED STATES DISTRICT COURT

RESPONSE OF THE UNITED STATES TO MOTIONS TO DISMISS Nos. 1, 2, 3, AND 4—Filed December 2, 1960

Now comes the United States Attorney for and on behalf of the United States of America, and, in response to motions to dismiss Nos. 1, 2, 3, and 4 filed on behalf of the defendants in the above-stated case, shows:

—1—

That all of the said motions are opposed on each and every ground set forth therein.

—2—

That none of said motions sets forth a lawful basis for dismissal of the indictment.

—3—

That the indictment correctly and properly alleges offenses against the laws of the United States and violations by the defendants of Sections 371 and 1341, Title 18, U.S.C.A.

WHEREFORE, it is prayed that said motions be overruled and denied.

CHARLES D. READ, JR.
United States Attorney
JOHN W. STOKES, JR.
Assistant United States Attorney

[fol. 46]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL BRIEF OF THE UNITED STATES—
Filed January 4, 1961

The indictment uses as its mailings three types of document. One is the carbon copy of the "Financial Service Agreement" referred to in Paragraph F (3) at pages 8-9 of the indictment. A copy of one of said forms is attached hereto and included as a part of this brief. Counts 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 39, 42 and 43 are based on such mailings.

Counts 2, 7, 12, 16, 31, 33, and 38 are based upon the mailings of a brochure entitled "When our Representative Calls," or some similar title. They are generally referred to in Paragraph B, page 4, and in parts of Paragraph G, pages 10-15. These brochures were mailed to the victims prior to the salesmen calling on them. A copy of such a brochure is attached hereto.

The third type of mailing, used in Counts 40 and 41, is the newspaper ads used for securing salesmen, as described in Paragraph C, page 4, of the indictment.

CONTRACT MAILINGS

The customer's copy of the financial service agreement, accompanied by a letter, was in each instance sent to him by certified mail, return receipt requested. A copy of the contract, letter and envelope relating to Count Three is included in this brief. As will be seen, the agreement itself provides that it "shall become effective when accepted at any Regional Office of Lenders Service Corporation. Notification of acceptance shall be made by returning to applicant a copy of this agreement executed by duly authorized personnel. In the event this agreement is not accepted by LSC the entire fee will be re-
[fol. 47] funded." Thus, while a check had been obtained from the victim prior to the mailing of the so-labeled "acceptance copy" to him, its receipt by the defendants was conditional upon acceptance. "Since communication

of intention is essential to an agreement . . . an acceptance, like an offer, . . . must, as a rule, be communicated to the offeror or put in the course of communication by an act." *17 Corpus Juris Secundum, pages 395-7.* "Where an express acceptance by the opposite party is required by the offer in order to establish a contract, the fact of such subsequent acceptance must be communicated to the offeror by the opposite party or competent agent of such party;" *Federal Farm Mortgage Corp.* v. *Dixon,* 185 Ga. 466, at p. 469, 195 S.E. 414.

Because of this it was essential that the acceptance copy be sent to the victim, or "applicant" as the contract calls him, in order for the defendants to make even a rudimentary claim to a right to keep the money. They chose the United States Mails as the medium of transmission, and such use was not only in furtherance of the scheme, but was absolutely essential, if the defendants were to keep the money without immediately exposing the fraud. It is significant that, whatever they may now claim, the defendants thought seriously enough of the effect of these mailings when they were made to use certified mail, return receipt requested, in every single instance.

Almost every count mailing involves a "split-fee" contract. These falsities were in addition to others appearing on the face of the document. True it is, that the defendants allegedly had no intention of obtaining the loans sought by their victims, and might be said, therefore, to have had no intention of obtaining more money in the form of the other half of the split fee. But they did not [fol. 48] tell the victims of this fact. In the 7th Circuit case of *U. S.* v. *Earnhardt,* 153 F. 2d 472, cert. den. 328 U. S. 858, the defendants had sold purportedly "oil-bearing" lands to the victims, and urged that since the claims by the defendants that they would assist investors in reselling the lands at no loss were false, the title to the lands was not in question and mailings of deeds to the victims after payment had been received were not in furtherance of the scheme. The court rejected this theory, saying "apart from the fact that several letters enclosing deeds also stated balances due on the accounts, obviously indicating that the ultimate purpose of the scheme, to

obtain money, had not been completed, we note also the fact that if the lands were to be resold at a profit, deeds proving title were essential, and their delivery to investors was necessary to the execution of the scheme." (p. 474)

To paraphrase this language in terms of the present case, it might be said that "while none of the copies of the executed financial service agreements sought further money payments of an immediate nature, they did state balances which would be due when the loans were obtained, and we note also the fact that if the applicant's original fee were to be retained and the contingent fee even possibly to be collected, acceptance of the agreement by the corporation, and communication of that acceptance to the client were essential, and the mailing of that acceptance to the applicant was necessary to the execution of the scheme."

The application of the *Parr*, *Kann* and *Gretchell* decisions to these mailings are discussed later in this brief.

Pamphlet Mailings

The counts concerning mailings of the "Before our [fol. 49] Representative Calls" pamphlets relate to mailings clearly intended to further the scheme. These pamphlets were sent to the victims after they had evinced an interest by sending in their business reply cards and before the salesman called on them.

The full use of the false implications they contain is mainly a matter of proof at the trial. They are designed through a seemingly innocuous discussion of the finance field to build the prestige of, and smooth the way for the salesman who was to follow. They contained outright false statements as to so-called "correspondent banks."

As we noted at the beginning of this brief, these mailings are described under the general terms of Paragraphs B and G of Count One. The fact that their use is not as specifically outlined in the description of the scheme, as are the accepted financial service agreements, does not limit their introduction in evidence in support of the counts based thereon. As outlined in our original brief, the scheme need not plan the use of the mails at all.

Weiss v. *U. S.*, 5th Circ., 122 F. 2d 675, cert. den. 314 U.S. 678, *Stapp* v. *U. S.*, 5th Circ., 120 F. 2d 898.

". . . it is sufficient that, having devised a scheme to defraud, the mails are actually used in effecting it; and a purpose to use the mails is no longer an essential element of the scheme devised, as it was under the former statute." *Blue* v. *U. S.*, 6th Circ., 138 F. 2d 351, at p. 359, cert. den. 322 U.S. 736.

Furthermore, the gist of the offense is the mailing and the sufficiency of detail in pleading is concerned with the use of the mails, not the description of the scheme. "The gist of the offense is the use of the mails and the scheme to defraud need not to be set forth with such precision as [fol. 50] if it were the gist of the offense." *Lechs* v. *U. S.*, 5th Circ., 118 F. 2d 246, at p. 247, cert. den. 314 U.S. 617, *U. S.* v. *Kniken*, D.C. Texas, 101 F.S. 929, aff. 196 F. 2d 223, cert. den. 344 U.S. 867, *Busch* v. *U. S.*, 8th Circ., 52 F. 2d 79, cert. den. 284 U.S. 687.

The newspaper counts are believed to need no further discussion.

The Parr, Getchell and Kann Decisions

In their supplemental brief the defendants contend in vigorous language that *Parr* v. *U. S.*, 363 U.S. 370, *Getchell* v. *U. S.*, 282 F. 2d 681, and (by implication) *Kann* v. *U. S.*, 323 U.S. 88, rule out the use by the government of the count mailings based on the acceptance copies of the financial service agreements. They argue that these cases hold that once money is obtained from the victim, further mailings cannot be the basis of an indictment, *whether or not the scheme had ended. Page 5, movant's reply brief.* A careful reading of the cases shows that they say nothing of the sort.

We have already outlined herein the factual situation surrounding the questioned mailings. The return of the accepted agreement was vital to the successful continuation of the scheme. Clearly, the defendants would not have been so naive as to think they could obtain the money and stop at that point; if so, the fraud would have become common knowledge early in its operation.

In *Parr*, the defendants operated a scheme to misappropriate School District revenues, the indictment containing nineteen counts of mail fraud and one of conspiracy. The mailings, to recite some illustrations, were: (1) notice to a taxpayer of a modification in the assessed [fol. 51] value of his property and advising of the tax owed (Count 1); (2) letter to a taxpayer giving notice of a hearing to be held by the Board to determine the taxable value of the taxpayer's property (Counts 2 and 5); (3) check of taxpayer in payment of taxes (Counts 3, 4, 6, 8 through 16); (4) mailings in connection with credit cards which will be later discussed (Counts 17, 18, and 19).

The Court first considered Counts 1 through 16, inclusive, saying:

> "The crucial question, respecting Counts 1 through 16 of the indictment, then comes down to whether the legally compelled mailings of the lawful—or, more properly, what are not charged or shown to have been unlawful—letters, tax statements, checks and receipts, complained of in those counts, properly may be said to have been for the purpose of executing a scheme to defraud because those legally compelled to cause and causing those mailings planned to steal an indefinite part of the receipts."

In answer to that question the Court said, in part:

> ". . . we think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys."

Clearly, the issue involved in the first sixteen counts of *Parr* is not involved in the instant case: there can be no issue that the mailings of the brochures or other documents were "legally compelled" in the sense that the tax notices referred to in the *Parr* case were compelled.

[fol. 52] Counts 17, 18 and 19 of the *Parr* indictment reached the activities of two of the defendants who util-

ized a credit card issued to the District to purchase gasoline and other products for their own use. In Count 17 the mailing was of "an invoice or statement" of Continental Oil Company, which issued the credit card, to the District for merchandise; Count 18 charged a mailing of the District's check to Continental Oil Company to pay for merchandise purchased; Count 19 charged a mailing of "a statement" of Continental Oil Company for merchandise purchased. With reference to these counts the Court said:

> "Counts 17, 18 and 19 of the indictment relate to a different subject. They charged, and there was evidence tending to show, that petitioners Oscar Carrillio, Sr. and Garza fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the District knowing, or charged with knowledge, that the oil company would use the mails in billing the District for those things. The mailings complained of in those counts were two invoices, said to contain amounts for items so procured by Carrillio and Garza, mailed by the oil company, at Houston, to the District, at Benavides, and the District's check mailed to the oil company, at Houston, in payment of the latter invoice. We think these counts are ruled by *Kann* v. *U.S.*, supra. Here, as in *Kann*, '(t)he scheme in each case had reached fruition' when Carrillio and Garza received the goods and services complained of. 'The persons intended to receive the (goods and services) had received (them) irrevocably. It was immaterial to them, or to any consummation of the scheme, how the (oil company) . . . would collect from the (District). It cannot be said that the mailings in question were for the purpose of [fol. 53] executing the scheme, as the statute requires.' 323 U.S., at 94."

The simple enunciation of the Supreme Court in the holding concerning the credit cards was that the scheme ended with each purchase, i. e., when the defendants received the merchandise. It is clear that the Court did

not hold a continuing scheme to be involved. The question we here approach is to distinguish the transactions from those of the credit cards.

It cannot be concluded from *Parr* that the Court overruled the continuing scheme exception as discussed in *Kann* v. *United States*, 323 U.S. 88 (1944), and recognized by the Circuit Court of Appeals, Fifth Circuit, in *Bauman* v. *United States*, 156 F. 2d 534 (1946); *United States* v. *Kuiken*, 101 F. Supp. 929 (W.D. Texas, 1951), affirmed, 196 F. 2d 223, certiorari denied, 344 U.S. 867, *United States* v. *Kreuter*, 119 F. Supp. 227 (W.D. Texas, 1954), affirmed, 218 F. 2d 532, certiorari denied, 349 U.S. 932.

In discussing the *Getchell* and *Parr* cases, it should first be established, how far, if at all, they have altered the law regarding mail fraud violations.

Getchell v. *U.S.*, 5th Circ., 282 F. 2d 681, as to the parts relied on by movants, is based upon the Securities Act of 1933, and not upon the mail fraud statute. This case cites the *Parr* case in an offhand fashion at p. 684, at a point in the opinion at which it is held that a certain mailing was "merely incidental and collateral to the (alleged) scheme and not a part of it." This refers to a letter from an attorney for the main defrauder, asking for the names in which the addressee wants his stock certificates issued. The recipient, one Fox, had already [fol. 54] fully and irrevocably paid for the shares which were to be issued to him.

In its opinion the Fifth Circuit cites *Kann* v. *U.S.*, 323 U.S. 88, as well as *Parr*, and the language quoted herein was taken by the court directly from the *Kann* decision. It appears from this that the *Parr* case was cited in connection with the gasoline credit card counts, and further that the Fifth Circuit is relying on, not departing from the *Kann* case. In citing both cases, virtually in the same breath, the court clearly indicates no belief that the *Parr* case has overruled, departed from, or extended the principles set down in *Kann*.

In the *Parr* case itself, the gasoline credit card counts are thrown out specifically on the ground that "they are ruled by *Kann* v. *U.S.*, supra." 370 U.S., at p. 393. The

dissenting opinion takes issue only with the majority's analysis of the facts in the case being consonant with those in the *Kann* case.

It is not necessary that we attempt to support the position of the dissenting Justices in *Parr* that there was a continuing scheme; our task is easier here because the indictment in the instant case details a scheme to defraud various named victims during a particular period of time, there being a factual recitation of a continuing scheme so that the mailings were all within the life of the scheme and in furtherance thereof. The indictment, we submit, spells a continuing course of conduct directed to the obtaining of money from victim after victim, the business of Lenders running at full blast to round up as many victims as could be induced to purchase the services of Lenders. In this connection, it is to be observed that the Supreme Court in *Parr* did not hold, in the first six- [fol. 55] teen counts, that the scheme ended with a receipt of each taxpayer's check, but instead rested its conclusion on other grounds, which we have discussed. Clearly, if a continuing scheme did not exist with reference to those counts, the Court would not have been put to the difficulties which it expressed and could have resolved the issue on that simple ground. Equally of interest, the defendants did not contend that a continuing scheme did not exist in the sixteen counts. The conclusion, accordingly, is inescapable that the Supreme Court enunciated the lack of a continuing scheme in the three credit card counts, reaching that view on the basis of the peculiar facts of those counts which are not here pertinent.

In evaluating these cases, therefore, it seems necessary basically to get back to *Kann* v. *U.S.* and see what it holds.

In the *Kann* case the defendants obtained the fruits of the fraud from the victims (in an indirect fashion) in the form of checks, which were cashed by defendants at a local bank. This bank then mailed these checks to the bank on which they were drawn, for collection. These were the mailings used in the prosecution. The court held that these mailings were not in furtherance of the scheme. The court said "The banks which cashed or

credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition." 323 U.S. 88, at p. 94.

The *Kann* decision was no new departure in the field of mail fraud law. In it the Supreme Court cited as precedent cases dating back to 1932. (*McNear* v. *U.S.*, 10th Circ., 60 F. 2d 861, cited in note 6, 323 U.S., at p. 94.) The *McNear* case cites as its authority the District [fol. 56] Court case of *U.S.* v. *Dale*, 230 F. 750, which was decided in 1915.

Certainly there is no fiat implicit in the *Kann* case to throw out all mail fraud cases where the money has been obtained prior to use of the mails. The opinion, in fact specifically states otherwise, when, at pages 94-5, it says:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward the receipt of the fruits of the fraud, such as *United States* v. *Kenofskey*, 243 U.S. 440. Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated. In these the mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough."

Cited in illustration of the latter class of cases are *U.S.* v. *Lowe*, 7th Circ., 115 F. 2d 596, cert. den. 311 U.S. U.S. 717, *U.S.* v. *Riedel*, 7th Circ., 126 F. 2d 81, and *Dunham* v. *U.S.*, 5th Circ., 125 F. 2d 895.

The *Lowe* case involves a check-kiting scheme. In *Dunham* v. *U.S.*, the Fifth Circuit Court of Appeals sustained a conviction under the following facts: The defendant obtained funds from his victims upon the pretense that he was going to invest it for them and share the profits. Instead of doing this he used a large part of the money for his own personal expenses. The mailings charged consisted of monthly statements sent to the investors, purporting to show the standings of their accounts, and the "profits" they were credited with. Many

of the investors sent him more money after receiving these reports. While the points made on the appeal are not all specifically stated, it was clearly a case where the [fol. 57] original money was obtained prior to the mailings, and illustrates the correct criterion which is that of whether the mailing acts in some way to further a continuing scheme, whether or not the money has been obtained.

In *U.S.* v. *Riedel,* also cited in the *Kann* case, 126 F. 2d, p. 83, the court said:

> "If the scheme to defraud were over, or had been abandoned, there could be no use of the mails *in furtherance* of it. The words "in furtherance of" as applied to the scheme may be established only when the scheme is still in existence."
>
> "We are satisfied, however, that the evidence shows, and rather clearly, that the scheme was not over. A scheme to defraud may well include later efforts to avoid detection of the fraud. A fraudulent scheme would hardly be undertaken, save for profit to the plotters. Avoidance of detection and prevention of recovery of money lost by the victims are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself not be ended."

To go further in evaluating the *Kann* case, it is helpful to examine a few of the many cases decided since it was, in which the facts are distingiushed from those in *Kann.*

Among these are: *U.S.* v. *Earnhardt,* 7th Circ., 153 F. 2d 472, cert. den. 328 U.S. 888 (mailing of deeds to purchasers of purported oil-bearing lands); *Clark* v. *U.S.,* D.C. Circ., 208 F. 2d 840, cert. den. 346 U.S. 865 (money obtained in 1941, purportedly to be invested by defendant on behalf of victim; mailings used were lulling letters written to victim ten years later, in 1951, when she got suspicious and suggested an accounting); *Bauman* v. *U.S.,* 5th Circ., 156 F. 2d 534 (forged check cashed for [fol. 58] defendant by a hotel, the check subsequently being mailed to the bank on which drawn).

The *Clark* case, supra, cites a number of others in support of the position taken there. Of interest are *U. S.* v. *Weimes*, 7th Circ., 157 F. 2d 797, in which the court said:

> ". . . a scheme to defraud may well include later efforts to avoid detection of the fraud. . . . There is ample evidence to indicate a continuation of activities designed to prevent too much complaint or inquiry, even after attempts from the limited partners had ceased, and the 'mailings' fall within this period of continued activity and cannot be said to be not 'in furtherance' of the scheme." (p. 799).

In *U. S.* v. *McAlpine*, 129 F. 2d 737, the same court, in an opinion written prior to the *Kann* decision, well described this area of fraud, saying:

> "Even though the scheme be successfully perpetrated by obtaining the victim's property, it still may be important to the schemer's purpose to adopt methods by which the victim *may* be lulled into a sense of security, or kept in the dark as to the true situation. Such activities, however, would not constitute a new scheme—they would merely serve in aid of the old. In other words, the methods and means employed to accomplish the object of a scheme to defraud are limited only by the ingenuity of the originator." (p. 739-40)

Conclusion

The movants here have argued, so vigorously as to sound very convincing, that the *Kann* case, and *Parr* case which followed it, have ruled that a mailing made after the money is collected is not a valid basis of prosecution, whether the scheme is ended, or not. We have, we [fol. 59] believe, shown here that neither of these cases, nor any other case, has ever established such a rule. We have cited cases decided before and after the *Kann* case and the *Parr* case to show that the question is now, *as it has always been*, that of whether the mailings is in furtherance of the scheme.

The indictment in this case is clearly sufficient, and the motions to dismiss should be overruled.

CHARLES D. READ, JR.
United States Attorney

JOHN W. STOKES, JR.
Assistant United States Attorney

[fol. 60]

Lenders Service Corporation
795 PEACHTREE BLDG., SUITE 594
ATLANTA 8, GEORGIA

ATLANTA JUN16'58 GA. 16

ATLANTA JUN16'58 GA. 16

ATLANTA JUN16'58 GA. 16

JWD AUG 5 1958

RETURN RECEIPT REQUESTED

C. J. French
Fla. Automotive Brake Corp.
327-29 America St.
Orlando, Fla.

JUN 19 10 58

CERTIFIED MAIL
No 573328

61212

60

49

[fol. 61]

61

TRINITY 6747

Lenders Service Corporation

795 PEACHTREE BLDG SUITE 594 ATLANTA 8, GEORGIA

June 16, 1958

C. J. French
327-29 America St.
Orlando, Fla.

Dear Mr. French:

We wish to thank you for the confidence you have expressed in our firm by retaining us to represent you.

Enclosed please find the acceptance copy of your Financial Service Agreement which has been properly executed by our firm.

You will also find enclosed five envelopes with enclosures inside. Four of these envelopes (marked: accountant, bank, and two to suppliers) are to be addressed and mailed by you to each of these parties. It is most important that you sign each one of the authorization cards that you mail.

The remaining envelope which is addressed to our office and contains a personal history form should be immediately returned with the history form filled out.

As soon as all the enclosed material has been received by us, we will send you a proof copy of our Business and Financial Report for your approval.

We sincerely trust that our work in your behalf will result in complete satisfaction.

Sincerely yours,
LENDERS SERVICE CORPORATION

Charles McCarthy
Regional Director

CMc/aw
encl;

JWD Aug 5 1958

[fol. 62]

Lenders Service Corporation

NEW YORK CHICAGO LOS ANGELES SAN FRANCISCO DENVER ATLANTA

FINANCIAL SERVICE AGREEMENT

Individual's Name Chester T Peach Date June 11-58

Business Name Peach Motor Finance Corp Phone No 688-5791

Business Address 329 Hurt St. Check No

City Cedar State Ind Amount Desired $ 2,200.00

Applicant Agrees To:

Provide LSC's authorized representative all necessary information to assist in preparation of Applicant's Preliminary Data Report.

Provide financial statements on standard LSC forms.

Provide credit references and bank references on standard LSC forms.

Provide any additional information or references promptly to LSC and/or lending companies subsequently requested.

Pay to LSC the sum of $ 200.00 as follows 200.00 this date and 100.00 on or before June 20 58 - 61.00 each month thereafter until loan is made.

Lenders Service Corporation Agrees To:

Review the preliminary data compiled and submitted by authorized representative for acceptance by LSC.

Publish and distribute to various finance companies a condensed description of applicants financial requirements immediately after acceptance of agreement.

Furnish necessary forms for applicant to provide data requested by LSC.

Prepare a detailed printed report describing the financial history and position of applicant's business based upon affidavit and information provided by applicant.

Submit printed report to various lending agencies and or individual lenders available to LSC.

Furnish applicant with sample copies of printed reports and inform applicant of any pertinent developments relating to this agreement.

This agreement shall become effective when accepted at any Regional Office of Lenders Service Corporation. Notification of acceptance shall be made by returning to applicant a copy of this agreement executed by duly authorized personnel. In the event this agreement is not accepted by LSC the entire fee will be refunded.

LSC agrees to perform its financial consulting services on behalf of Applicant with the understanding that such services do not include negotiation of loans or other capital grants to Applicant. Applicant hereby authorizes LSC to act on its (their) behalf by selling financial data and other information furnished by Applicant to lenders and lending institutions and authorizes LSC to confirm such data within the discretion of LSC by direct correspondence with Applicant's credit and bank references, accountant, or by other means.

LSC representatives are not authorized to change, waive, delete or add to any of the printed provisions of this agreement other than to complete this form in designated spaces. LSC will immediately render services to applicant based upon Applicant's Preliminary Data Report; therefore this agreement is not cancelable after acceptance by LSC. This agreement, a copy of which applicant has retained, contains the entire understanding between us, and no other representation, statement or promise has been made that is not set forth herein. Applicant to pay reasonable attorney's fees and all costs of collection in the event of a default in the above payment schedule. Receipt of the above sum on behalf of LSC is hereby acknowledged. Make all checks and drafts payable to Lenders Service Corporation.

LENDERS SERVICE CORPORATION

M. E. Arata
Authorized Representative

Accepted in Atlanta, Ga. 6/24/58
Date

By Milton K. Ley
Regional Director

Peach Motor Finance Corp.
Name of Business

By Chester T Peach
Applicant Title

AUG 5

LATER in APRIL I
Received THIS Letter

64

Perhaps you and he can save valuable time if you will give some preliminary thought to the various types of additional business funds that are available through commercial lending companies and other accredited sources.

Financial business assistance may be obtained by various means subject to your business and/or personal circumstances.

Some of these financing methods are briefly described here:

CHATTEL MORTGAGE LOAN: This type of loan is granted when operating [redacted]ry, equipment, fixtures, delivery equipment, is used to [redacted]he terms of the loan.

PURCHASE AND LEASE-BACK OF EXISTING EQUIPMENT: This type of transaction is used when a scale of e[redacted]equipment is m[redacted]a lessor and leased back for a [redacted] of years. The [redacted] this method of obtaining additional capital allows substantial tax benefits as all lease payments are fully deductible from current income.

PURCHASE AND LEASE OF NEW EQUIPMENT: This method, while offering the tax advantage mentioned above, p[redacted] capital to be obtained for expansion or replacement [redacted] obs[redacted] or depreciated assets and offers a further advantage of not appearing as a liability on the balance sheet.

REAL ESTATE LOAN ON EXISTING EQUITY: A real estate loan may be obtained as a secondary [redacted] where a present mortgage or trust deed now ex[redacted]sts. [redacted] also possible to refinance existing real estate with the acquisition of a new and larger commitment.

REAL ESTATE LOAN FOR NEW CONSTRUCTION OR LAND DEVELOPMENT: When building for business or development of land is contemplated it is pos ble to get a loan commitment prior to construction or development by submission of plans and financial data.

FACTORING OF ACCOUNTS RECEIVABLE: Factoring is used to finance accounts receivable. Where accounts receivable exist, such accounts receivable can be sold for immediate cash to a factoring orga[redacted]

INVENTORY [redacted] Inventory may be used as collateral under certain conditions under which the control of the inventory is satisfactory to the lender.

LOANS SECURED BY PRIME SECUR[redacted]ORTGAGES, NOTES OR OTHER ACCEPTABLE COLLATER[redacted] can be pledged as [redacted]rity.

CAPITAL INVESTMENT: Capital financing by the sale of capital stock or a partnership interest is sometimes av[redacted]such arra[redacted]s are often made with a clause p[redacted] repurc[redacted]such capital interest under specified conditions.

DISCOUNTING OF CONDITIONAL SALES AGREEMENT: Sales of consumer products sold under the terms of a conditional sales agreement can be discounted with finance companies. Such discounting assures the immediate use of cash on consummated sales.

FINANCING BY THE USE OF FUNDS FROM LOCAL INVESTORS: Many individual investors seeking to employ capital profitably in their local city are willing to grant loans which are properly secured.

UNSECURED LOANS Unsecured loans are granted where the credit rating of the person or firm seeking loan funds is well established over a period of years.

Commercial and Business Affiliations:

SECURITY FIRST NATIONAL BANK
6358 Hollywood Blvd.
Los Angeles 28, California

MEMBER: CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA
1501 West 8th Street, Los Angeles, California

MEMBER: LOS ANGELES CHAMBER OF COMMERCE
404 S. Bixel Street, Los Angeles, California

MEMBER: NATIONAL SMALL BUSINESS MEN'S ASSOCIATION, INC.
801 Nineteenth Street, N. W., Washington 6, D. C.

MEMBER: NATIONAL ASSOCIATION OF CREDIT MEN
229 4th Avenue, New York 3, N.Y.

ATTORNEYS: ANTONOW, WEISSBOURD AND GREENBERG
3540 Wilshire Boulevard, Los Angeles 5, California

Trade, financial and credit references are available upon request.

Correspondent Banks:

The Chemical Corn Exchange Bank
New York 15, N.Y.

The Citizens and Southern National Bank
Atlanta 8, Georgia

The American National Bank
Chicago 2, Illinois

The Denver National Bank
Denver 2, Colorado

The First National Bank in Dallas
Dallas 2, Texas

Lenders Service Corporation

785 PEACHTREE BLDG., SUITE 594
ATLANTA 8, GEORGIA

LETTER #1

Roger E. Barefield.
Magnolia Grocery
8th St., S.
Waynesboro, Georgia

REB. 54

[fol. 66]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND OPINION ENTERED—March 4, 1961

The indictment in the above stated case consists of some forty odd pages containing forty-four counts charging defendants in 43 of the counts with violations of the mail fraud statute, 18 U.S.C.A., § 1341 and in Count Forty-Four with a conspiracy to violate such statute.

Paragraphs 1 through 7 and A through G of Count One charge in great detail an alleged scheme and artifice to defraud named persons which it is alleged defendants devised and intended to devise. Paragraph H of Count One alleges that on or about January 6, 1958, for the purpose of executing said scheme and artifice and attempting to do so that defendants did unlawfully, willfully and knowingly, cause to be placed in an authorized depository for mail matter an envelope and contents addressed to J. E. Claggett, Jr., 1006 N. W. 6th Avenue, Fort Lauderdale, Florida, to be sent and delivered by the Post Office Department of the United States in violation of § 1341, Title 18, U.S.C.A.

Paragraph 1 of Counts Two through Forty-Three reallege, by reference, all of the allegations of Count One except those contained in Paragraph H. Paragraph 2 of Counts Two through Forty-Three allege that defendants, on specified dates, placed in authorized depositories for mail matter "an envelope and contents" addressed to specified individuals or firms to be sent and delivered by the Post Office Department of the United States in violation of § 1341, Title 18, U.S.C.A. In Paragraph 2 of Counts Forty and Forty-One it is alleged that on specified dates, defendants, for the purpose of executing the scheme and artifice did willfully, unlawfully and knowingly cause to be placed in authorized depositories for mail, copies of a newspaper containing in the classified advertising section certain advertisements which are set [fol. 67] out verbatim, to be sent and delivered by the Post Office Department of the United States, in violation of § 1341, Title 18, U.S.C.A. The text of the advertise-

ment set out in Count Forty of the indictment is as follows:

"SALESMEN
THINKERS
IS WHAT WE WANT
MEN WHO CAN USE
GOD'S GIFT — THE
BRAIN — WITHOUT
GETTING IT RUPTURED

"To these men regardless of background, we offer a golden opportunity to from $15,000 to $30,000 a year on straight commission, work from qualified leads (not just names), interviewing businessmen on the problems of Small Business Finance. Must be over 30, have a car and be free to travel 7-state area. Home weekends. Phone Mr. Steele, TR. 2-0322."

The text of the advertisement set out in Count Forty-One is as follows:

"BOOK MEN
"OVER 30 YEARS OF AGE

"We have several ex-bookmen on our staff that are earning from $300 to $600 week on straight commission. Work from qualified confirmed leads (not just names), calling businessmen in 3-4 state area, home weekends, no night work, no cancellations. You keep all you earn. Phone Mr. J. N. Steele, TR. 2-0322."

The defendants have filed four motions to dismiss. In motion No. 1 defendants, separately and severally, move to dismiss the indictment on the ground that the indictment taken as a whole, and each and every count thereof taken separately, fail to charge an offense against the laws of the United States.

[fol. 68] In motion No. 2 defendants separately and severally move "to dismiss all but one of the first 43 counts in the indictment upon the ground that under 18 U.S.C.A., § 1341, only one crime is committed by use of

the mail to execute an alleged scheme to defraud by obtaining by false pretenses, no matter how many mailings were made to execute such alleged scheme."

In motion No. 3 defendants separately and severally move to dismiss all of the counts of the indictment, except one, on the ground that all of the counts are as a matter of law conspiracy counts and charge one and the same conspiracy.

In motion No. 4, defendants separately and severally move to dismiss the indictment and each and every count thereof on the ground that the indictment embraces a fatal misjoinder of offenses and defendants in that defendants, and each of them, are charged in the same indictment, and in the same counts thereof, with two, separate and distinct schemes and offenses carried on through separate and distinct corporate entities, perpetrated by separate and distinct individuals, who are alleged to have made different, separate and distinct representations, with separate and distinct objectives, etc. Defendants pray in this motion that the indictment be dismissed or that other appropriate relief be granted, either by granting a severance as to defendants not connected with Business Mart of America and Charles Ford & Associates, or by striking all references to these two corporations.

These four motions of defendants to dismiss are now properly before the Court for determination under Local Rule 15.

[fol. 69] In response to the motions to dismiss the United States opposes the motions on each and every ground thereof and contends:

1. That none of the motions set forth a lawful basis for dismissal of the indictment.
2. That the indictment correctly and properly alleges offenses against the laws of the United States and violations by defendants of §§ 371 and 1341 of Title 18, U.S.C.A.

Briefly, the scheme and artifice to defraud alleged, without setting out the particular part alleged to have been played therein by the defendants individually, is that defendants would contact, through certain of de-

fendants acting as salesmen, individuals or firms desiring to sell their business or of obtaining loans therefor, and would make to them numerous false and fraudulent pretenses, representations and promises relating to the ability and intention of defendants to sell or help sell a victim's business or to make, secure, or help to secure business loans for said victims; defendants' salesmen would, after inquiry from an owner of a business, visit such owner personally and induce them to enter into contracts purporting to be applications for the services of "Business Mart of America, Charles Ford and Associates, Inc., or Lenders Service Corporation," relating to the sale of the victim's business or building or to the obtaining of a loan for such business and would induce the owner to agree to pay and to pay a fee for such services; that after a salesman had obtained a check for the purported services and had left the place of business of a victim that he would immediately take such check to the bank upon which it was drawn and have it converted into a cashier's check; that when the applications for services [fol. 70] were transmitted with the check for the fee to the regional office of defendants, that it was a part of the scheme that defendants would accept all of the applications, deposit all of the fees in defendants' bank account, "without any study, appraisal or evaluation of said victim's eligibility for a loan from any source whatever"; that following such "acceptance" the defendants would mail to said victims a "signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which they had falsely and fraudulently represented they would perform; that the further purpose of such letter was to inform such victims that "they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound thereby and had no recourse for retrieving his money." It is alleged that it was a "further part of the scheme and artifice to defraud that defendants would not perform the services orally represented by the salesmen and otherwise represented

by the defendants through their advertising and literature to said victims in that they would not sell the business of the victims, they would not procure buyers for the business of such victims, and they would not bring such buyers into contact with the victims," etc., and would not and did not obtain loans, or make or try to obtain loans for such victims.

It is further alleged that it was a part of the scheme alleged "that defendants would and did distribute, send and display through newspapers, magazines, direct mailings, and direct display by the salesmen numerous advertisements and promotional documents, all of which con- [fol. 71] tained numerous false and fraudulent statements, pretenses and representations which the defendants then and there well knew and intended to be false and fraudulent when made."

In a supplemental brief filed by respondent it is stated that the contents of the envelopes referred to in paragraph 2 of Counts 2, 7, 12, 16, 31, 33 and 38 was a brochure entitled "When Our Representative Calls" and that these brochures were mailed prior to any representative or salesman calling on the "victims." A copy of the brochure is attached to the brief. Respondent contends that the mailing of this brochure or pamphlet was "intended to further the scheme." This brochure sets out and discusses the various types of business loans and financing methods obtainable "subject to your business and/or personal circumstances," and it does not appear, nor does respondent contend, that any of these statements were false, its contention being that such brochures "contained outright false statements as to correspondent banks." Defendants contend that a fair reading of the pamphlet "is to give the named banks as references." No reference is contained in the indictment to correspondent banks, or that defendants made any false representations with reference to correspondent banks.

The purpose of Congress in enacting § 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses. This statute "does not purport to reach all frauds but *only those limited instances in which the use of the mails*

is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." (italics supplied). *Kann* v. *United States*, 323 U.S. 88, 95. Thus only mailings which are "a part of the execution of the [fol. 72] fraud" or "*incident to an essential part of the scheme*" fall within the ban of the federal mail fraud statute. (italics supplied). *Parr* v. *United States*, 363 U.S. 370 at p. 391.

The Court is of the opinion that it can not hold as a matter of law that the mailings of the brochures referred to in Counts 2, 7, 12, 16, 31, 33 and 38, under the above holdings, were not "incident to or an essential part of the scheme" and that the same was not "a part of the execution of the fraudulent scheme alleged." This is also true of the mailings of the newspaper ads involved in Counts 40 and 41.

It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, supra, and the case of *Getchell* v. *United States*, 5 Cir., 282 F. 2d 681, were not for the purpose of "executing" the scheme.

Motion No. 1 to dismiss is as to Counts 2, 7, 12, 16, 31, 33, 38, 40 and 41, denied. The motion to dismiss as to the remaining counts of the indictment is sustained and such counts of the indictment are hereby dismissed.

There is no merit in motions to dismiss Nos. 2, 3 and 4 and the same are overruled and denied. See *Pinkerton* v. *United States*, 328 U.S. 640.

Defendants have also filed a motion for a Bill of Particulars. This motion will be stated and determined only as it relates to Counts 2, 7, 12, 16, 31, 33, 38, 40 and 41 to which the Court has overruled the motions to dismiss.

1.

As to paragraph 2 of Counts 2, 7, 12, 16, 31, 33 and [fol. 73] 38, defendants move that the respondent be required to state:

1. What the "contents" of the envelope were.

2. In what manner the same served to "execute" the alleged fraudulent scheme or device and particularly whether said contents served to "obtain money" from the addressee named, or whether such money had already been obtained.

2.

As to the allegation in Paragraph B of Count I (which are realleged in the other counts of the indictment) that defendants did:

> ". . . distribute, send and display through newspapers, magazines, direct mailings and display by the salesmen numerous advertisements and promotional documents, all of which contained numerous false and fraudulent statements, pretenses and representations which the defendants then and there well knew and intended to be false and fraudulent when made . . . ."

and the further allegation in paragraph G of Count I that defendants did:

> ". . . through the medium of the oral representations of the salesmen and the aforesaid literature and publications and advertising prepared and distributed by the defendants, make and intend to make numerous false and fraudulent pretenses, representations and promises, which were known and intended by defendants to be false and fraudulent when made . . . ."

the defendants move that respondent be required to state:

1. Whether any such "written matter" was deposited [fol. 74] in the mails in the Northern District of Georgia.
2. If so deposited, that the written matter so deposited be specifically identified.
3. What false and fraudulent statements or representations, if any, such written matter is alleged to have contained.

3.

That respondent be required to state the corporation (whether Charles Ford & Associates, Inc., Business Mart of America, or Lenders Service Corporation) on behalf of which the "envelope and contents" was mailed.

4.

That respondent be required to state whether any of defendants other than defendants Ruttenberg, Sampson and Miller had any connection with Charles Ford & Associates, Inc., or Business Mart of America, Inc.

5.

That respondent be required to state the approximate date each individual defendant was employed by Lenders Service Corporation and the approximate date each such defendant ceased to be employed by Lenders Service Corporation.

6.

That if respondent intends to use as a witness on the trial any alleged "victim" not specifically named as addresses in paragraph 2 of each count, that it be required to state:

1. The name and address of each such alleged "victim" and the name of the business in question.

[fol. 75]

2. The name of the defendant or defendants with whom he dealt.
3. Which of the three corporations involved such defendant claimed to represent.
4. When such "victim" discussed with any of defendants the sale of such business or the obtaining of a loan therefor.
5. If any defendant is charged with making a false statement or promise, the content thereof, whether it was oral or written, and in what particular the same was false.

What false statement, pretense or promise each defendant is alleged to have made, if any, to each of the "victims" specifically named as addresses of the "envelope and contents" referred to.

Respondent opposes the motion on the ground that it seeks matters which are not the proper subject of a bill of particulars.

In its supplemental brief, respondent has furnished the information as to what the contents of the envelopes were and states that such mailings were made prior to any salesman or representative calling on the "victims."

"The purpose of an indictment is to apprise the accused of the crime charged against him with such reasonable certainty as will enable him to make his defense and avail himself of his conviction or acquittal for protection against another prosecution for the same offense." *Johnson* v. *United States*, 5 Cir., 207 F. 2d 314, cert. den., 347 U.S. 938.

The indictment here follows generaly Form 3, Appendix [fol. 76] of Forms, Federal Rules of Criminal Procedure, 18 U.S.C.A. The elements of the offense covered by the mail fraud statute are (1) intention to defraud; and (2) execution of the intention by the use of the mail. These elements are clearly charged in the instant indictment.

The motion for a bill of particulars is overruled and denied.

This the 1st day of March, 1961.

BOYD SLOAN
United States District Judge

[fol. 77]

IN UNITED STATES DISTRICT COURT

Amendment to Order of Dismissal—April 3, 1961

The Court on March 1, 1961, having entered an order dismissing all counts of the above stated indictment, except Counts Nos. 2, 7, 12, 16, 31, 33, 38, 40 and 41, and the Court having in the same order overruled the defendants' motions for a bill of particulars;

It is further Ordered that the Court's aforesaid order of March 1, 1961, is hereby amended so as to provide that the defendants' motion for a bill of particulars is granted, insofar as the same requests descriptions of the contents of the mailings used as the basis for the counts of said indictment, and that the description of said mailings which was filed by the United States Attorney as a part of a supplemental brief, which description is referred to at pages Nos. 5 and 6 of the Court's order of March 1, does constitute such a bill of particulars and is so considered by the Court for the purposes of the Court's order of dismissal aforesaid.

The within order shall be effective *nunc pro tunc* as of March 1, 1961.

This the 3d day of April, 1961.

Boyd Sloan
United States District Judge

[fol. 78]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 30, 1961

1. Name and address of Appellant:
United States of America
Northern District of Georgia
402 Old Post Office Building
Atlanta, Georgia

2. Name and address of Appellant's attorneys:
Charles D. Read, Jr., United States Attorney
John W. Stokes, Jr., Assistant United States Attorney
J. Robert Sparks, Assistant United States Attorney
Northern District of Georgia

3. Offense:

Use of the mails to defraud, in violation of Section 1341, Title 18, U.S.C.A.; conspiracy to use the mails to defraud, in violation of Section 371, Title 18, U.S.C.A.

4. Concise statement of judgment or order appealed from:

The order of the District Court dated March 1, 1961, sustaining the defendants' motion to dismiss the indictment and dismissing the said indictment as to all counts except Counts 2, 7, 12, 16, 31, 33, 38, 40, and 41.

5. All of the defendants in said case are free on bail.

The United States of America, the above named Appellant, hereby appeals to the United States Court of

[fol. 79] Appeals for the Fifth Circuit from the above stated judgment.

Dated: March 30, 1961

CHARLES D. READ, JR.
United States Attorney

JOHN W. STOKES, JR.
Assistant United States Attorney

J. ROBERT SPARKS
Assistant United States Attorney

• • • •

[fols. 80-83] • • • •

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing

[fols. 85-139] • • • •

[fol. 140] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18900

UNITED STATES OF AMERICA, APPELLANT

versus

RALPH L. SAMPSON, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

OPINION—January 18, 1962

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This appeal was taken by the United States of America from a judgment of the district court dismissing, for failure to state an offense, th. y-five counts of a forty-four count indictment against twenty-three individual defendants and one corporate defendant. The indictment was based upon 18 U. S. C. § 1341, charging that appellees had used the mails to defraud. Besides a motion to dismiss the appeal on the ground that the judgment appealed from was not a final judgment, the [fol. 141] appellees filed an alternative motion challenging the jurisdiction of this Court and praying that we certify the appeal to the Supreme Court of the United States on the contention that exclusive jurisdiction of the appeal was lodged in the Supreme Court. We think that this motion is well taken and that the Supreme Court does have exclusive jurisdiction to determine the appeal and, accordingly, we certify the appeal to that Court.

This action is taken pursuant to the terms of 18 U. S. C. § 3731, which provides in part:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the

Supreme Court of the United States in all criminal cases in the following instances:

> "From a decision or judgment setting aside, or dismissing any indictment . . . or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded . . .
>
> "If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

[fol. 142] Decision of this point turns upon the determination of whether the court below dismissed any count of the indictment based upon its "construction" of the Mail Fraud Statute, supra. We think that it did. The following language is taken from the judgment of the district court:

> "The purpose of Congress in enacting § 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses . . . Thus only mailings which are 'a part of the execution of the fraud' or 'incident to an essential part of the scheme' fall within the ban of the federal mail fraud statute . . .
>
> "It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails . . . were not for the purpose of 'executing' the scheme."

It seems clear that every word of the quoted language was used in the "construction" of the Mail Fraud Statute. The district court was declaring what the statute meant in its provision "for the purpose of executing such scheme or artifice . . ." It was holding that using the mail in con-

nection with transactions where the money had already been obtained from the victims did not constitute an "executing" of the scheme. It had to determine from other cases and from its own construction of the statute itself whether the mailings charged in the several counts of the indictment amounted, under the law, to an "execution" of the scheme described in the indictment. As to [fol. 143] the facts set forth in nine counts of the indictment, it held that the actions charged therein did constitute an execution of the scheme. As to the thirty-five counts here involved, it held that the actions set forth in the respective counts did not constitute an "execution" of the scheme.

The district court had to determine the meaning of the Act, particularly of the word "execution," and to assay the language of the several counts to determine whether the actions charged did constitute execution of the scheme under its construction of the meaning of the words used in the statutes. The decision reached by it was clearly "based upon the . . . construction of the statute upon which the indictment . . . is founded."

In their briefs on the merits, the parties differed sharply on whether mailings made after money had already been obtained from the victims did constitute execution of the scheme within the meaning of the Mail Fraud Statute. Construction of the meaning of the statute was a *sine qua non* of a decision by the district court. That being true, the Supreme Court of the United States has exclusive jurisdiction of the appeal.[1]

---

[1] Movants quote at length from the brief of the United States on the merits in an effort to show that the brief admits that the court below construed the Mail Fraud Statute, notwithstanding that it used the word "misconception" instead of the word "misconstruction." Here is a part of the Government's brief which movants quote:

"In so ruling, the Court has adopted the position that even though a fraud scheme encompasses dealings with numerous victims and continues for a number of years, relying, as it must, for success, upon the pacifying and lulling of past victims as well as the finding of new ones, that once a victim has parted with his money no further mailing by the fraud operators to him can possibly be a part of the *execution of the fraud. This ruling is based upon a misconception of the law of mail fraud.*" [Emphasis added.]

[fol. 144] Aside from any admission by the United States that the district court was here engaged in construction of the statute, we think that the Supreme Court cases relied upon by the movants amply sustain that view. *United States* v. *Borden Company*, 308 U. S. 188; *United States* v. *Mersky*, 361 U. S. 431, 434; *United States* v. *Hvass*, 355 U. S. 570; *United States* v. *Turley*, 352 U. S. 407; *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533; *United States* v. *Halseth*, 342 U. S. 277; *United States* v. *Hood*, 343 U. S. 148; *United States* v. *Bramblett*, 348 U. S. 503; *United States* v. *Howard*, 352 U. S. 212; *United States* v. *International Union*, 352 U. S. 567.

In the recent case of *United States* v. *Mersky*, supra, the Supreme Court dealt at some length with the addition to the statute of the right invoked by the movants here and used these words (361 U. S. p. 434) in defining the duty which we conceive is laid upon us here:

> ". . . The Criminal Appeals Act specifies several conditions, any one of which permits a direct appeal by the Government to this Court, and makes our jurisdiction in such cases exclusive. In the event that an appeal which should have been taken here is erroneously effected to a Court of Appeals, that court is directed to certify it here."

We hold, accordingly, that the appeal was erroneously effected to this Court and it is ordered that it be and it is certified to the Supreme Court of the United States.

[fol. 145] IN
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18,900

D. C. Docket No. 22385 Crim.

UNITED STATES OF AMERICA, APPELLANT

versus

RALPH L. SAMPSON, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

JUDGMENT—January 18, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the cause be, and it is hereby certified to the Supreme Court of the United States in accordance with the opinion of this Court.

Issued: January 18, 1962

[fol. 146] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 147]

SUPREME COURT OF THE UNITED STATES

No. 735, October Term, 1961

UNITED STATES, APPELLANT

vs.

RALPH L. SAMPSON, ET AL.

ORDER NOTING PROBABLE JURISDICTION—April 2, 1962

APPEAL from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 638862 1319

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON ET AL.

ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States District Court for the Northern District of Georgia dismissed 35 of 44 counts of an indictment charging mail fraud (18 U.S.C. 1341) and conspiracy, on the ground that they did not charge offenses under the laws of the United States (R. 68–72). The government, being of the opinion that the district court had misconstrued the indictment, appealed from the order of dismissal to the court of appeals under the Criminal Appeals Act, 18 U.S.C. 3731, *infra*. The court of appeals held that this Court has exclusive jurisdiction of the appeal because, in its opinion, the district court had "construed" a law of the United States (18 U.S.C. 1341) in dismissing the 35 counts. It accordingly certified the appeal to this

Court (R. 85–89). Appendix, *infra*, pp. 15–19. The government moves for remand of the cause to the court of appeals on the ground that the district court construed the indictment and the government's theory of prosecution embodied in the dismissed counts, and did not construe the mail fraud statute as such.

STATUTES INVOLVED

Section 1341 of Title 18 U.S.C. provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 3731 of Title 18 U.S.C. provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

An appeal may be taken by and on behalf of the United States from the district court to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * * *

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

STATEMENT

1. A 44-count indictment returned in the District Court for the Northern District of Georgia charged the defendants, Lender's Service Corporation and 23 individuals, with using the mails in the execution of a scheme to defraud, in violation of 18 U.S.C. 1341, and with conspiracy to commit such offenses (R. 1–43).

The scheme charged in the indictment was, essentially, that the defendants, with no intention to perform the services promised, planned to obtain money from businessmen on the basis of false representations that the defendants maintained business organizations with specialized knowledge which would be able to assist the victims in the sale of their businesses or in the placement of loans. To this end, corporations were organized, salesmen hired and trained, and advertisements and other promotional material disseminated. In detail, the indictment alleged that each victim would be induced to sign a contract and pay an advance fee for such services, upon representations that the fee would be refunded if the application for services was not accepted at one of the regional offices of the defendants, but that, if the application was accepted and the fee kept, this meant that the application had been approved and that the promised services would be rendered. It was part of the scheme that defendants would accept all of the applications which were accompanied by checks for the advance fees and keep the fees without regard to the financial condition of the individual victim, his ability to obtain a loan from any source, or to sell his business. Following each such acceptance, there would be mailed to the victim a signed copy of the accepted application together with a form letter representing that the application had been accepted and that services would be performed. Thereafter, upon receipt of information from the victim, financial data would be compiled in a rudimentary form and documents would be sent to a few lending agencies without any attempt at correla-

tion between the type of loan sought and the type of loans handled by those lending agencies. For the purpose of further lulling the victims, letters would be sent advising of the sending of the reports in order to attempt to convince the victims that valuable services were being performed.

Each of the 43 substantive counts charged a separate mailing of "an envelope and contents" or portions of newspapers (counts 40 and 41) to a specified addressee for the purpose of executing the scheme.

2. On November 10, 1960, the defendants moved to dismiss all of the counts of the indictment on the ground that they failed to charge offenses against the laws of the United States (R. 44). Defendants also filed a motion for a bill of particulars. In opposing the motion to dismiss, the government filed a "supplemental brief" in the district court which that court treated as a bill of particulars (R. 46–59, 77).

In the supplemental brief, the government pointed out that the substantive counts of the indictment were predicated upon three types of mailings to the victims: (1) mailings of carbon copies of accepted "Financial Service Agreements" (the "contract mailings" involved in 34 of the dismissed counts); (2) mailings of brochures (7 counts); and (3) mailings of newspaper advertisements (2 counts). A copy of the "Financial Service Agreement" was appended to the brief (R. 60–62). It provided for payment of a fee upon signing the contract, and later payments, the final one to be made upon acceptance of a loan. It was also provided that the agreement was not cancellable after acceptance (R. 62). The contract authorized Lender's Service Corporation to send financial data to lending

institutions (R. 62). The form letter, accompanying the accepted agreement, requested the addressee to send enclosures to an accountant, bank, and two suppliers and to fill out a personal history form (R. 61). It stated that:

> As soon as all the enclosed material has been received by us, we will send you a proof copy of our Business and Financial Report for your approval.

The government in its brief also stated that "defendants allegedly had no intention of obtaining the loans sought by their victims, and might be said, therefore, to have had no intention of obtaining more money in the form of the other half of the split fee. But they did not tell the victims of this fact" (R. 47–48).

3. On March 2, 1961, the district court granted the motion to dismiss as to the 34 substantive counts based upon the "contract mailings" and the conspiracy count (count 44), and overruled the motion as to the nine counts based upon the mailings of brochures and newspaper advertisements (R. 66–72). The court quoted from the decisions of this Court in *Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, that the mail fraud statute "does not purport to reach all frauds *but only those limited instances in which the use of the mails is a part of the execution of the fraud,* leaving all other cases to be dealt with by appropriate state law"; and that "only mailings which are 'a part of the execution of the fraud' or *'incident to an essential part of the scheme'* fall within the ban of the federal mail fraud statute" (emphasis in original) (R.

71–72). After denying the motion as to the nine counts, the court held (R. 72):

> It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, *supra*, and the case of *Getchell* v. *United States*, 5 Cir. 282 F. 2d 681, were not for the purpose of "executing" the scheme.[1]

ARGUMENT

It is settled that, if a dismissal of an indictment is predicated exclusively upon a construction of the statute upon which the indictment is founded, an appeal from the dismissal lies to this Court alone. If, on the other hand, the dismissal is predicated, even in part, upon a construction of the indictment, the appeal must go to the court of appeals. *United States* v. *Jones*, 345 U.S. 377 (discussed *infra*, pp. 10–12). In this case, the district court ruled that the dismissed counts failed to charge offenses because the mailings on which the counts were based occurred after the defendants had obtained from the particular victims to whom the mailings were addressed all the money which they expected to get from them. The court of appeals regarded this as a construction of the mail fraud

[1] On April 4, 1961, the court amended its order of March 2, 1961, and granted the defendants' motion for a bill of particulars as to the contents of the mailings. It referred to the fact that the material set forth in the government's brief had been treated as a bill of particulars by the court in its order of dismissal (R. 77).

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statute in that the district court interpreted the statute as not covering any mailing which occurs after a victim has parted with all the money a defrauder anticipates getting from him. This is unquestionably one aspect of the district court's decision, but it is not the only one. Where the court of appeals erred, we believe, was in failing to recognize that this ruling by the district court was based upon a preliminary interpretation of the indictment, an interpretation which the government challenges as erroneous. This latter question of interpretation, and with it all other questions involved in the appeal, are properly for determination by the court of appeals.

The initial error underlying the ruling of the district court was that it construed the indictment as charging a separate, terminable scheme as to each individual victim, with the result that the question whether a contract mailing was in execution of that scheme would have to be judged in the isolated context of the dealings between the defendants and the individual to whom the mailing was sent. In our view, that was not what the indictment charged. It alleged a general and continuing scheme to defraud a whole group of people by means of an elaborate structure involving the creation of corporations, the hiring and training of salesmen, and the use of extensive advertising material. None of this was discontinued or was expected to be discontinued the minute any particular victim was defrauded of his advance fee. The subsequent letter to each victim, as explained below in more detail, was essential to lulling him into a sense of security so that the on-going scheme of

deceiving numerous victims could be executed. In other words, the indictment charged, not merely isolated disconnected schemes aimed separately at separate individual victims, but a widespread, integrated, continuing fraudulent interprise, the aim and purpose of which was to defraud as many victims as could be duped by the defendants' fraudulent promises and representations. We think the district court erred in viewing the indictment as charging a scheme to defraud from the standpoint of each particular victim, rather than from the general over-all plan of the defendants. The proper approach, in our view, is to consider the full scheme set forth in the indictment, which obviously encompassed more than the defrauding of any particular individual. As alleged, the defendants intended to continue to perpetrate their fraudulent scheme upon one victim after another for as long as they were able to carry it on. The whole elaborate establishment was both designed and necessary to the accomplishment of this purpose.

It was this error in its understanding of the nature of the scheme alleged which led the district court to conclude that, on the face of the indictment, the scheme had reached fruition as to each victim when he paid the advance fee and that the later contract mailing was neither in fact nor in purpose calculated to further the scheme. This, as we have shown, is an erroneous interpretation of the indictment, as supplemented by the government's bill of particulars.[2] For

[2] For the purposes of the Criminal Appeals Act, the particulars are to be considered part of the indictment. See *United States* v. *Lem Moy*, 330 U.S. 724, 725; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

each of these mailings consisted of more than the accepted contract previously signed by the victim when he paid the advance fee. With each such mailing, the victim received a letter asking him to send information which the defendants represented they would use to prepare a financial report to be sent to him for approval. It was further represented that the report would be used by the defendants in performing the services they had contracted to undertake. The district court's interpretation of the indictment overlooks the impact of this letter in the context of the over-all continuing scheme to defraud numerous victims and the allegations that the contract mailings were an integral part of the general scheme, calculated to lull the victims and thus, by concealing the defendants' fraudulent purpose, to enable them to perpetrate further frauds as part of their scheme.

Since these questions of the proper construction of the indictment must be settled first, before the issue of statutory interpretation is reached, the cause must be considered by the court of appeals under *United States* v. *Jones*, 345 U.S. 377 (which was not cited to or by the court of appeals). In *Jones*, a two-count information charged the defendant, a Florida prison official, with having whipped certain prisoners in order to extort confessions from them regarding violations of prison rules so that illegal and summary punishment could be imposed upon them in violation of specified rights guaranteed by the due process clause of the Fourteenth Amendment. In dismissing the information, the district court construed it as alleging that the whippings were administered for the

purpose of disciplining the prisoners for past bad conduct, and held that, so construed, the information did not charge federal offenses because the power of the states to regulate their internal affairs, including the running of their prisons, had never been surrendered to the federal government. See *United States* v. *Jones*, 108 F. Supp. 266 (S.D. Fla.). From this decision the United States appealed directly to this Court under 18 U.S.C. 3731, *supra*. The Court remanded the cause to the court of appeals on the ground that the decision of the district court depended upon a construction of the information which the government was attacking. The Court said (345 U.S. at 378):

> On appeal, the Government predicates its argument for reversal upon the assumption that the information charges far more than the District Court found it charged. The Government construes the information to charge that appellee wilfully extorted confessions of violations of prison rules from the prisoners and wilfully inflicted illegal summary punishment upon them, in violation of the laws of Florida and the Constitution of the United States. Thus, the Government's appeal—the theory of the prosecution—is based upon a construction of the information which differs significantly from the construction which the District Court has placed upon it.
>
> The Criminal Appeals Act, *supra*, strictly limits the scope of our jurisdiction over this appeal. We may only entertain questions relating to the construction of the Civil Rights Act, *supra*, and its applicability to this information. We cannot re-examine the information

> and construe it *de novo,* for we are bound by the District Court's construction. * * *

Just as the government construed the scope of the information in *Jones* to charge more than the district court found the information to charge, so in the instant case the government construes the indictment, as supplemented by the bill of particulars, to charge much more than the restricted interpretation given by the district court on the counts in question. And just as the district court in *Jones,* after its restrictive interpretation of the scope of the information, found that the information did not charge offenses under the laws of the United States, so the district court in the instant case, after its restrictive interpretation of the indictment, found that the dismissed counts did not charge offenses against the laws of the United States. Thus, the same considerations which led this Court to remand the *Jones* case to the court of appeals—an interpretation by the district court of the charges which was at variance with the government's theory of prosecution, and, as interpreted, the conclusion by the district court that the charges did not allege offenses against the laws of the United States—are present in the instant case.

The decision of this Court in *Jones* is, therefore, dispositive of this certified appeal, and the appeal should, as in *Jones,* be remanded to the court of appeals for a decision on the merits of the case.[3]

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[3] The cases relied upon by the court of appeals to indicate that the district court had interpreted a law of the United States and that, therefore, the appeal should properly be to the Supreme Court are inapposite. All of those cases involved clear-cut interpretations by the district court of the laws of the United States, and nothing more.

CONCLUSION

For the reasons stated, it is respectfully submitted that this case should be remanded to the court of appeals.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1962.

APPENDIX

In the United State Court of Appeals for the Fifth Circuit

No. 18900

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(January 18, 1962)

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circiut Judge: This appeal was taken by the United State of America from a judgment of the district court dismissing, for failure to state an offense, thirty-five counts of a forty-four count indictment against twenty-three individual defendants and one corporate defendant. The indictment was based upon 18 U.S.C. § 1341, charging that appellees had used the mails to defraud. Besides a motion to dismiss the appeal on the ground that the judgment appealed from was not a final judgment, the appellees filed an alternative motion challenging the jurisdiction of this Court and praying that we certify the appeal

to the Supreme Court of the United States on the contention that exclusive jurisdiction of the appeal was lodged in the Supreme Court. We think that this motion is well taken and that the Supreme Court does have exclusive jurisdiction to determine the appeal and, accordingly, we certify the appeal to that Court.

This action is taken pursuant to the terms of 18 U.S.C. § 3731, which provides in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment * * * or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment * * * is founded * * *
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Decision of this point turns upon the determination of whether the court below dismissed any count of the indictment based upon its "construction" of the Mail Fraud Statute, supra. We think that it did. The following language is taken from the judgment of the district court:

> The purpose of Congress in enacting § 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses * * *. Thus only mailings which are "a part of the execution of the fraud" or "incident to an essential part of

> the scheme" fall within the ban of the federal mail fraud statute * * *
>
> It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails * * * were not for the purpose of "executing" the scheme.

It seems clear that every word of the quoted language was used in the "construction" of the Mail Fraud Statute. The district court was declaring what the statute meant in its provision "for the purpose of executing such scheme or artifice * * *." It was holding that using the mail in connection with transactions where the money had already been obtained from the victims did not constitute an "executing" of the scheme. It had to determine from other cases and from its own construction of the statute itself whether the mailings charged in the several counts of the indictment amounted, under the law, to an "execution" of the scheme described in the indictment. As to the facts set forth in nine counts of the indictment, it held that the actions charged therein did constitute an execution of the scheme. As to the thirty-five counts here involved, it held that the actions set forth in the respective counts did not constitute an "execution" of the scheme.

The district court had to determine the meaning of the Act, particularly of the word "execution," and to assay the language of the several counts to determine whether the actions charged did constitute execution of the scheme under its construction of the meaning of the words used in the statute. The decision reached by it was clearly "based upon the * * * construction of the statute upon which the indictment * * * is founded."

In their briefs on the merits, the parties differed sharply on whether mailings made after money had already been obtained from the victims did constitute execution of the scheme within the meaning of the Mail Fraud Statute. Construction of the meaning of the statute was a *sine qua non* of a decision by the district court. That being true, the Supreme Court of the United States has exclusive jurisdiction of the appeal.[1]

Aside from any admission by the United States that the district court was here engaged in construction of the statute, we think that the Supreme Court cases relied upon by the movants amply sustain that view. *United States* v. *Borden Company,* 308 U.S. 188; *United States* v. *Mersky,* 361 U.S. 431, 434; *United States* v. *Hvass,* 355 U.S. 570; *United States* v. *Turley,* 352 U.S. 407; *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533; *United States* v. *Halseth,* 342 U.S. 277; *United States* v. *Hood,* 343 U.S. 148; *United States* v. *Bramblett,* 348 U.S. 503; *United States* v. *Howard,* 352 U.S. 212; *United States* v. *International Union,* 352 U.S. 567.

In the recent case of *United States* v. *Mersky,* supra, the Supreme Court dealt at some length with

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[1] Movants quote at length from the brief of the United States on the merits in an effort to show that the brief admits that the court below construed the Mail Fraud Statute, notwithstanding that it used the word "misconception" instead of the word "misconstruction." Here is a part of the Government's brief which movants quote:

"In so ruling, the Court has adopted the position that even though a fraud scheme encompasses dealings with numerous victims and continues for a number of years, relying, as it must, for success upon the pacifying and lulling of past victims as well as the finding of new ones, that once a victim has parted with his money no further mailing by the fraud operators to him can possibly be a part of the *execution of the fraud. This ruling is based upon a misconception of the law of mail fraud.*" [Emphasis added.]

the addition to the statute of the right invoked by the movants here and used these words (361 U.S. p. 434) in defining the duty which we conceive is laid upon us here:

> * * * The Criminal Appeals Act specifies several conditions, any one of which permits a direct appeal by the Government to this Court, and makes our jurisdiction in such cases exclusive. In the event that an appeal which should have been taken here is erroneously effected to a Court of Appeals, that court is directed to certify it here.

We hold, accordingly, that the appeal was erroneously effected to this Court and it is ordered that it be and it is certified to the Supreme Court of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, *Appellant*,

v.

RALPH L. SAMPSON, ET AL., *Appellees*.

ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEES' BRIEF IN OPPOSITION TO MOTION TO REMAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 735

UNITED STATES OF AMERICA, *Appellant,*

v.

RALPH L. SAMPSON, ET AL., *Appellees.*

ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEES' BRIEF IN OPPOSITION TO MOTION TO REMAND

The United States District Court for the Northern District of Georgia dismissed 35 of 44 counts of an indictment against appellees (hereinafter called "defendants") on the ground that the counts dismissed did not charge offenses under the mail fraud statute (18 U. S. C. § 1341). The district court relied on *Kann* v. *United States,* 323 U. S. 88, and *Parr* v. *United States,* 363 U. S. 370. The Government appealed to the Court

of Appeals for the Fifth Circuit under the Criminal Appeals Act (18 U. S. C. § 3731, quoted in Appendix, pp. 14-15). The court of appeals certified the case to this Court, holding that under the Criminal Appeals Act this Court's jurisdiction is exclusive because the issue raised by the appeal is the correctness of the district court's construction of the mail fraud statute. The Government has moved "for remand of the cause to the court of appeals on the ground that the district court construed the indictment and the Government's theory of prosecution embodied in the dismissed counts, and did not construe the mail fraud statute as such." (Motion to Remand, p. 2).

SUMMARY OF ARGUMENT

There is no issue on this appeal as to the facts charged in the indictment but only as to whether those facts constitute a violation of the statute. In the district court, both parties recognized that the indictment charged a continuing scheme to defraud in the course of which the mailings at issue were in each instance subsequent to the collection of the money from the alleged victim. There was no misunderstanding of these facts by the district court. The district court held that mailings subsequent to the collection of the money, but while the scheme continued, were not violations of the mail fraud statute because they were not part of the "execution" of the scheme within the meaning of that statute as construed by this Court in *Kann* and *Parr*. The Government rested its case upon the argument that the continuing nature of the venture, or "continuing scheme", provided a basis for distinguishing *Kann* and *Parr*. The defendants pointed out in the district court in great detail that the *Kann* and

Parr cases also involved continuing schemes.[1] In dismissing the counts at issue here, the district court rejected the distinction suggested by the Government and adopted the construction of the mail fraud statute urged by defendants. The issue on appeal, then, is whether the proper construction of the statute is that urged by defendants or by the Government. This Court, therefore, has exclusive jurisdiction of the appeal, and the Government's motion to remand to the court of appeals should be denied.

ARGUMENT

It is apparent that the district court's order dismissing the 35 counts was based solely upon the construction of the mail fraud statute. This order described all essentials of the scheme charged in the indictment, namely, that certain defendants would personally visit individuals and firms and, by numerous false representations, induce such persons and firms to sign applications for services and to pay advance fees therefor (R. 69); that such fees were immediately converted into cashier's checks (R. 69); and that such fees and applications were then transmitted to defendants' regional office, where the applications were ac-

[1] The portion of the *Parr* case pertinent here deals with counts 17 through 19, relating to a fraudulent scheme to obtain gasoline by use of credit cards belonging to the School District (363 U.S. 392-393). As to those counts, this Court held that "the scheme in each case had reached fruition" when defendants received the fruits of the fraud, and mailings occurring thereafter were not "for the purpose of executing the scheme" although the scheme to defraud the School District was still continuing. [This Court in the *Parr* case relied on other grounds in reversing convictions on Counts 1 through 16, based on "legally compelled" mailings relating to tax assessments and collections. The holding as to these first 16 counts is not pertinent for present purposes.]

cepted and the fees deposited in defendants' bank account (R. 70). The district court then quoted from the indictment the charge that, following the acceptance of the applications,

> ". . . . the defendants would mail to said victims a signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing [that] their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which they had falsely and fraudulently represented they would perform . . . ." (R. 70, quoting from R. 10).

After summarizing and quoting the indictment, the district court construed the mail fraud statute as follows, citing the two leading cases construing that statute:

> "The purpose of Congress in enacting Section 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses. This statute 'does not purport to reach all frauds but *only those limited instances in which the use of the mails is a part of the execution of the fraud,* leaving all other cases to be dealt with by appropriate state law.' *Kann* v. *United States,* 323 U.S. 88, 95. Thus only mailings which are 'a part of the execution of the fraud' or '*incident to an essential part of the scheme*' fall within the ban of the mail fraud statute. *Parr* v. *United States,* 363 U.S. 370 at page 391." [Italics by district court] (R. 71-72).

Finally, the district court stated its reason for dismissing those counts based on the mailings of accepted contracts and "lulling" letters, as follows:

> "It appears that the mailings involved in the remaining counts of the indictment relate to

> transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, supra, and the case of *Getchell* v. *United States*, 5 Cir. 282 F.2d 681, were not for the purpose of 'executing' the scheme." (R. 72).

The dismissal of the counts referred to was clearly based upon the district court's construction of the mail fraud statute, and in particular, the word "executing". As the court of appeals stated,

> "The District Court was declaring what the statute meant in its provision 'for the purpose of executing such scheme or artifice . . .' It was holding that using the mail in connection with transactions where the money had already been obtained from the victims did not constitute an 'executing' of the scheme."

The district court's opinion does not allude to any ambiguity in the indictment which it resolved one way rather than another, or to any defect in the indictment as a matter of criminal pleading. It deals solely with the substance of the charge. This was the only issue raised by defendants' Motion No. 1 (R. 44), which the district court sustained as to the 35 counts which it dismissed. The case therefore falls squarely within the rule stated by Mr. Chief Justice Hughes, speaking for a unanimous court, in *United States* v. *Borden Company*, 308 U.S. 188, 198:

> ". . . (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute."

This Court clearly has jurisdiction where the issue is the construction of a particular word or phrase in a statute, here the statutory phrase "for the purpose of executing."[2]

The Government admits that the construction of the mail fraud statute was "unquestionably one aspect of the district court's decision" (Motion to Remand, p. 8), but argues vaguely that the district court also misconstrued the indictment. The Government does not state precisely in what respect the district court misconstrued the facts charged in the indictment, and points to nothing in the district court's order indicating that it found the indictment ambiguous, vague, or indefinite (as was the indictment in the only case cited on this point by the Government, *United States* v. *Jones*, 345 U.S. 377, discussed below). As best we can understand it, the Government is suggesting that the district court failed to understand that the scheme alleged in the indictment was a continuing one aimed at numerous individuals, and that the letters

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[2] Compare: *United States* v. *Turley*, 352 U.S. 407, involving construction of the term "stolen" in the Dyer Act, 18 U.S.C. § 2312; *United States* v. *Southeastern Underwriters Association*, 322 U.S. 533, 536, involving construction of the term "commerce" in the Sherman Act, 15 U.S.C. § 2; *United States* v. *Halseth*, 342 U.S. 277, involving construction of the phrase "concerning any lottery", in § 213 of the Criminal Code, 18 U.S.C. § 1302; *United States* v. *Hood*, 343 U.S. 148, involving construction of the phrase "any appointive office or place under the United States" in 18 U.S.C. § 215; *United States* v. *Bramblett*, 348 U.S. 503, involving construction of the phrase "in any matter within the jurisdiction of any department or agency of the United States", in 18 U.S.C. § 1001; *United States* v. *Howard*, 352 U.S. 212, involving construction of the phrase "contrary to the law of the state" in 16 U.S.C. § 852; and *United States* v. *International Union*, 352 U.S. 567, involving construction of the word "expenditures" in 18 U.S.C. § 610.

supporting the dismissed counts were alleged to have "lulled" the recipients by representing that the promised services would be performed.

The Government suggests that the district court misconstrued the indictment as charging a "separate terminable scheme as to each individual victim." (Motion to Remand, p. 8). But, as the Government correctly asserts, the alleged scheme "obviously encompassed more than the defrauding of any one particular individual." (Ibid, p. 9). This is so obvious from the indictment that it is surprising that the Government now contends that the district court failed to comprehend it. The first two lines of the indictment charge "That, beginning prior to March 9, 1956, and continuing until June 1, 1959" (R. 1), the defendants devised and intended to devise a scheme and artifice to defraud. The indictment then charges that the scheme was aimed, not only at 46 specifically named persons (R. 2), but also at "numerous and divers other persons throughout the United States. . . ." (R. 3). It charges more than 40 mailings, spanning a period of sixteen months, from January 6, 1958 (R. 17) through May 16, 1959 (R. 29). Thus, the continuing nature of the alleged scheme is clearly charged. There is certainly no warrant for assuming as a premise, as the Government does, that the district court overlooked the obvious, when there is nothing in the district court's order indicating any such misunderstanding. On the contrary, the district court's order shows a clear understanding of this aspect of the indictment (R. 70). The district court simply held that the continuing nature of the scheme alleged in the indictment provided no basis for distinguishing the *Kann* and *Parr* cases, which also

involved continuing schemes covering an extended period of time.

The Government also states that the district court's order "over-looks the impact" of the so-called "lulling" letters on which the Government relies (Motion to Remand, p. 10), and suggests that the Court somehow misconstrued the indictment "as supplemented by the bill of particulars." (Ibid, pp. 9, 12). The Government surely cannot intend to argue that the district court actually overlooked the sample letter reproduced in the record (R. 61), since it was incorporated into the record by an "Amendment to Order of Dismissal" (R. 77), which was initiated by the Government itself and which recites that portions of the Government's "Supplemental Brief" (R. 46-65) were treated as a bill of particulars. The Government's argument seems intended to imply that the nature and significance of the matter mailed (i.e., the "lulling" letters) does not appear from the indictment, but is only revealed by the sample letter itself (R. 61). The fallacy of this argument is that the inclusion of the full text of this sample letter adds nothing to the clear charge in the indictment, which summarizes the substance and purpose of this letter as follows (R. 10):

> "... defendants would mail to said victims a signed copy of the accepted applications, together with a form letter, for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform...."

The district court's order quotes this portion of the indictment (R. 70). The Government makes no attempt to show that the sample letter had any significance—much less "impact"—beyond what was already alleged in the indictment.

The Government's present position that the district court misconstrued the indictment appears to be an afterthought devised to avoid a decision by this Court of an important question of statutory construction. The Government's brief on the merits in the court of appeals—which was filed before the defendants filed their motion to certify the case to this Court—did not argue that the district court had misconstrued the indictment. On the contrary, as the court of appeals pointed out, the Government's brief on the merits in that court described the ruling of the district court as follows:

> "In so ruling, the Court has adopted the position that even though a fraud scheme encompasses dealings with numerous victims and continues for a number of years, relying, as it must, for success upon the pacifying and lulling of past victims as well as the finding of new ones, that once a victim has parted with his money no further mailing by the fraud operators to him can possibly be a part of the execution of the fraud. This ruling is based upon a misconception of the law of mail fraud." (Appellant's brief on merits in court of appeals, p. 14, as quoted by court of appeals. See Appendix to Government's Motion to Remand, p. 18, Note 1.).

This quotation shows that the Government then contended that the district court's ruling was "based upon a misconception of the law of mail fraud", which is

simply another way of saying that it was based upon a misconstruction of the mail fraud statute. It also shows that the Government did not then contend that the district court misunderstood the indictment; rather, the Government then complained that the district court had dismissed certain counts "even though" they charged a continuing scheme "encompassing dealings with numerous victims" and dependent "for success upon the pacifying and lulling of past victims."[3]

The one case relied upon by the Government, *United States* v. *Jones*, 345 U.S. 377,[4] involved an indictment later characterized by the court of appeals as "duplicitous, ambiguous and argumentative". 207 F. 2d at 787.

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[3] The recognition on all sides that the indictment charged a continuing scheme is further reflected in the "Supplemental Brief" filed by the Government in the district court which has been incorporated in the record (R. 46-65). In this brief, the Government summarized the contentions of the parties as follows:

> "They [defendants] argue that these cases [Parr, Kann and Getchell] hold that once money is obtained from the victim, further mailings cannot be the basis of an indictment, *whether or not the scheme had ended*. . . . (R. 50) (Emphasis in original).
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>
> "The movants here have argued, so vigorously as to sound very convincing, that the *Kann* case, and *Parr* case which followed it, have ruled that a mailing made after the money is collected is not a valid basis of prosecution, *whether the scheme is ended, or not*. We have, we believe, shown here that neither of these cases, nor any other case, has ever established such a rule. We have cited cases decided before and after the *Kann* case and the *Parr* case to show that the question is now, *as it has always been*, that of *whether the mailing is in furtherance of the scheme*." (R. 58-59) (Emphasis supplied).

[4] Remanding appeal from the District Court for the Southern District of Florida, 108 F. Supp. 266, to the Court of Appeals for the Fifth Circuit; on remand, 207 F. 2d 785.

In view of this ambiguity, the district court found it necessary to construe the indictment as to whether it charged that the purpose of certain punishment administered to a State prisoner was to extort confessions and inflict summary punishment in violation of constitutional rights, or merely to discipline the prisoner. Unlike the case at bar, the district court in the *Jones* case expressly construed the indictment, stating:

> "Both counts are subject to the construction that the whippings were administered for the purpose and with the intent of disciplining said prisoners for having illegally escaped, and I so construe the allegations of each count." 108 F. Supp. at 268.

In the *Jones* case, the Government contended that the indictment should have been construed as charging punishment to extort confessions and inflict summary punishment in violation of constitutional rights. This Court remanded the case to the court of appeals so that it could construe the ambiguous indictment to determine whether its allegations were such as to support the Government's theory of prosecution. But in the case at bar, neither the district court nor the parties found any significant ambiguity in the dismissed counts of the indictment. The district court did not hold that the *indictment* fails to support the Government's theory of prosecution; but rather that the *mail fraud statute*, properly construed, fails to support the Government's theory of prosecution. Moreover, the court of appeals, to which the Government would have this case remanded, has already reviewed the record and found no issue as to an ambiguity in the indictment such as the Government now suggests, but only an issue as to the construction of the statute.

This case raises an important question as to the proper construction of the statutory phrase requiring that a mailing be "for the purpose of executing" the scheme. The Government argued in the district court and presumably still contends that the "correct criterion" under the mail fraud statute is "whether the mailing acts in some way to further a continuing scheme," (R. 57) and repeatedly stated the test as being whether a mailing "furthers" or is "in furtherance of" a scheme. (See R. 49, 54, 55, 59). Obviously the phrase "in furtherance of" is much broader than the statutory phrase "for the purpose of executing". Defendants contended in the district court and contend now that the word "executing" is to be narrowly construed, particularly in the context of a criminal statute, and that the *Kann* and *Parr* cases support this narrow construction. This issue as to the proper scope of the statutory term "executing" is now squarely before this Court for decision under the Criminal Appeals Act.

The Government may well be anxious to avoid a decision of this case by this Court, which recently construed the mail fraud statute narrowly in the *Parr* case, and may prefer a decision by the court of appeals, which originally decided the *Parr* case in the Government's favor. *Parr* v. *United States*, 265 F. 2d 894. However, the Criminal Appeals Act does not give the Government an option to choose its forum: and the Government should not be allowed to accomplish this result indirectly by injecting into the case an artificial issue and contending that the indictment carries some hidden ambiguity which has not been apparent to the defendants, the district court or the court of appeals.

CONCLUSION

We respectfully submit that this Court has exclusive jurisdiction of this appeal, and that the Government's motion to remand the case to the court of appeals should be denied.

Respectfully submitted,

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APPENDIX

Criminal Appeals Act, 18 U.S.C., Section 3731

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. June 25, 1948, c. 645, 62 Stat. 844, amended May 24, 1949, c. 139, § 58, 63 Stat. 97.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 55–63) is not reported. The opinion of the court of appeals certifying the appeal to this Court (R. 67–70) is reported at 298 F. 2d 826.

JURISDICTION

The judgment of the district court was entered on March 1, 1961 (R. 55, 60, 64). On March 30, 1961, the government filed a notice of appeal to the Court of Appeals for the Fifth Circuit (R. 65–66). On January 18, 1962, the court of appeals, holding that the judgment dismissing 35 counts of the indictment involved a construction of the mail fraud statute, certified the appeal to this Court pursuant to 18

U.S.C. 3731 (R. 67–70, 71). On February 23, 1962, the government moved this Court to remand the case to the court of appeals, contending that the appeal had properly been taken to that court. On April 2, 1962, this Court denied the government's motion and noted probable jurisdiction (369 U.S 836; R. 72). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether, in a continuing scheme to defraud, designed to mulct as many members of the public as possible, the use of the mails for the purpose of delaying or discouraging efforts at recovery by victims who have already parted with their money, and for the further purpose of lulling past victims into inaction so as to prevent disclosure and permit the defrauding of future victims, is a mailing in execution of the scheme within the proscription of the mail fraud statute.

2. Whether, assuming the correctness of the district court's ruling dismissing 34 of the 43 substantive counts, it was error to dismiss the conspiracy count, which charged as objective offenses the mailings recited in the substantive counts sustained by the court as well as the mailings involved in the dismissed counts.

STATUTE INVOLVED

Section 1341 of Title 18 of the United States Code provides in pertinent part:

> § 1341. *Frauds and swindles.*
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false

> or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * or knowingly causes to be delivered by mail according to the direction thereon, * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

1. Count 1 (R. 1–14) of a 44-count indictment (R. 1–34), filed April 29, 1960, in the United States District Court for the Northern District of Georgia, charged the appellees—23 individual defendants and Lenders Service Corporation—with having knowingly deposited in the mails, for the purpose of executing a scheme and artifice to defraud, a described envelope and its contents, in violation of 18 U.S.C. 1341, *supra*. Counts 2 to 43, inclusive (R. 14–31), charged 42 additional mailings in furtherance of the scheme. Count 44 (R. 31–34) charged the same defendants with having conspired to use the mails in furtherance of the scheme, in violation of 18 U.S.C. 371.

On March 1, 1961, the district court, on appellees' motion, dismissed all but nine of the counts (2, 7, 12, 16, 31, 33, 38, 40 and 41) on the ground that the counts stricken failed to charge federal offenses (R. 60). From this order the government appealed to the Court of Appeals for the Fifth Circuit (R. 65–66), which held that the judgment of dismissal involved construction of the mail fraud statute and, accord-

ingly, certified the appeal to this Court (R. 67–70, 71).

2. Briefly summarized, the scheme charged (R. 3–14) was as follows:

The individual defendants planned to defraud businessmen throughout the country who wished to sell their businesses or obtain business loans by pretending to assist them in the realization of one or the other of these objectives, in return for a fee (R. 2, 3–4). To this end, corporations were organized (including the defendant Lenders Service Corporation), salesmen were hired and trained, and advertisements and other promotional material disseminated (R. 3–5). The defendants, in fact, never intended to perform the services for which they contracted. They would not procure buyers for victims who wished to sell their businesses, or bring prospective purchasers into contact with them; nor would they make any attempt to obtain business loans for those who wanted them (R. 7).

After the owner or operator of a business showed interest in the defendants' services, they would dispatch a salesman to persuade the prospect to enter into a contract (relating to the sale of his business or the procurement of a loan, as the case might be) and to pay an advance fee (R. 5–6). The victim would be told that his advance would be refunded if his application for the defendants' services was not "accepted" at one of their regional offices, but that, if the application was accepted and the advance fee was retained, this meant the promised valuable services would be rendered (R. 7).

The plan was to accept every such application indiscriminately, if accompanied by the prescribed "advance," without regard to the applicant's financial condition, his ability to obtain a loan, or the possibility of selling his business (R. 7–8). The application would be rejected if the intended victim had not signed the form, had stopped payment on his check before the defendants could cash it, or had not forwarded the full amount of the advance fee (R. 8).

Following acceptance, the plan called for mailing to the victim a signed copy of the accepted agreement, together with a form letter stating that the application had been accepted (R. 8). This, it was anticipated, would lull the victim into believing that he would soon receive the benefit of the valuable services specified in the agreement, and that, in any event, he could no longer cancel the contract and obtain a refund of his advance fee (*ibid.*). If the application was for asistance in obtaining a loan, the defendants would compile in rudimentary form the financial data which had been obtained from the victim and would then forward these so-called "business and financial reports" to a few lending agencies. Such reports would be sent without any regard to, or attempt at correlation between, the type or size of the loan sought and the loans handled by these agencies (R. 8–9). Finally, the defendants would write their "clients" advising them of this action, in a further attempt to convince them that they had not been defrauded and

that valuable services were indeed being performed on their behalf (R. 9).

Upon receipt of complaints from the victims regarding false statements and promises made to them by the salesmen or field representatives, the defendants would pretend to investigate. They would encourage the field representatives to deny having made the misrepresentations alleged and would then write the victim that, in view of the salesman's denial, they could not refund the fee. In refusing to make refunds the defendants again would misrepresent the services already performed and to be performed (R. 9).

3. Each of the 43 substantive counts, except counts 40 and 41, charged a separate mailing of "an envelope and contents" to a specified addressee for the purpose of executing the scheme (R. 14–28, 30–31). Counts 40 and 41 charged the mailing, in furtherance of the scheme, of copies of newspapers containing advertisements for salesmen (R. 28–30).

On November 10, 1960, the defendants moved to dismiss all counts of the indictment on the ground that they failed to charge offenses against the laws of the United States (R. 35). They also filed a motion for a bill of particulars (R. 60). In opposing the motion to dismiss, the government filed a "supplemental brief" (R. 37–54) which the district court treated as a bill of particulars (R. 64).[1] The govern-

[1] As originally ntered, the order of March 1, 1961 overruled the defendants' motion for a bill of particulars (R. 62). On April 3, 1961, the court amended the order, *nunc pro tunc*, granting the motion to the extent of permitting the description of the mailings contained in the government's supplemental

ment stated in the supplemental brief that the mailings involved in the substantive counts consisted of three types of documents (R. 37). The first type, supporting 34 counts (all except counts 2, 7, 12, 16, 31, 33, 38, 40 and 41), was the "customer's copy" of the "Financial Service Agreement," showing acceptance of the application for the defendants' services in obtaining a business loan, which was mailed to the victim after he had sent in his check for the advance fee (see *supra*, pp. 4–5) (R. 37–38). The other two types were (1) a brochure entitled "When Our Representative Calls," or some similar title, which was mailed to the victim before the salesman's visit and before he made any payment (involved in counts 2, 7, 12, 16, 31, 33 and 38), and (2) newspaper advertisements soliciting salesmen (counts 40 and 41) (R. 37, 52–54).

A copy of one of the "Financial Service Agreements" (that involved in count 3) was appended to the supplemental brief (R. 51), together with a copy of the form letter which accompanied the accepted agreement when it was mailed to the victim (R. 50). The agreement provides that the applicant will pay Lenders Service Corporation $900 for its services in attempting to arrange for a $20,000 loan. Of this amount, $200 is indicated as having been paid on the date of the signing of the application (June 11, 1958); a second payment, of $250, is stated to be due on or

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brief in opposition to the motion to dismiss to serve as a bill of particulars (R. 64). On the propriety of considering a bill of particulars in ruling on a motion to dismiss, see *United States* v. *Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

before a subsequent date (June 20, 1958); and the final payment, of $450, is to be made "when loan is made." The agreement provides that it will become effective "when accepted at any Regional Office of Lenders Service Corporation"; that notification of acceptance will be made by returning a copy of the agreement to the applicant, duly executed by an officer of the corporation; and that, in the event the agreement is not accepted by the company, "the entire fee will be refunded." The agreement is declared to be "not cancellable after acceptance" by the company—for the reason that immediately upon acceptance the company is to render services to the applicant based upon the latter's "Preliminary Data Report." The exhibit agreement had been "accepted" by a regional director of Lenders Service Corporation, at Atlanta, Georgia, on June 16, 1958 (R. 51).

The accompanying form letter thanks the recipient for the confidence he has expressed in Lenders Service Corporation by retaining it to represent him, and informs him that the acceptance copy of his Financial Service Agreement, properly executed, is enclosed. The letter also refers to additional enclosures, described as "authorization cards," which the recipient was instructed to sign and mail to designated individuals and companies (an "accountant," a "bank," and two "suppliers"). Another enclosure, consisting of a "personal history form" was to be filled out by the addressee and returned to Lenders Service Corporation. The letter advises that as soon as all the enclosed material has been received by Lenders Service Corporation the corporation will send the recipient a "proof

copy of our Business and Financial Report" "for your approval" and expresses the hope that the company's work in the addressee's behalf will result "in complete satisfaction" (R. 50). In each instance, the accepted agreement and the accompanying letter were sent to the victim by certified mail, "return receipt requested" (R. 38, 49).

The government conceded that, after obtaining the advance fee, the defendants had no intention of earning the balance due on the service contracts. No further payments were expected to be got from the victim.

4. On March 1, 1961, the district court granted the motion to dismiss as to the 34 substantive counts based upon the "contract mailings," and the conspiracy count (count 44), and overruled the motion as to the nine counts involving the brochures and newspaper advertisements (R. 55–60). The court quoted statements from the opinions of this Court in *Kann* v. *United States*, 323 U.S. 88, 95, and *Parr* v. *United States*, 363 U.S. 370, 391, to the effect that the mail fraud statute "does not purport to reach all frauds but *only those limited instances in which the use of the mails is a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law"; and that "only mailings which are 'a part of the execution of the fraud' or *'incident to an essential part of the scheme'* fall within the ban of the federal mail fraud statute" (emphasis by the district court) (R. 59–60). After denying the motion as to the counts involving the brochures and newspaper advertisements, the court held (R. 60):

It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, *supra,* and the case of *Getchell* v. *United States,* 5 Cir., 282 F. 2d 681, were not for the purpose of "executing" the scheme.

SUMMARY OF ARGUMENT

1. Dismissal of 34 counts of the indictment based on mailings effected after the addressee had already parted with his money was error. It is true the mail fraud statute does not reach every use of the mails connected with a scheme to defraud; it prohibits only those which advance the plan. But the scheme is not always concluded when the victim's money changes hands. Thus, here, mailing accepted copies of the service agreements, together with the accompanying letters, served two purposes in furtherance of the scheme to defraud.

a. Most immediately, looking only to the particular victim, these communications were designed to make it possible for the swindlers to keep what they so far held only precariously. Since the "advances" received were, as a matter of contract, refundable until the applications were accepted, notification of acceptance was an essential prerequisite to obtaining even color of title to the monies. Thereafter, the victim might think himself cut off from demanding a refund. Moreover, by indicating that substantial services were being performed, the mailings would tend to discourage efforts at recovery, even after

the victim had begun to suspect that he had been defrauded.

b. Delaying the victim's discovery of the fraud also served a larger purpose. The scheme was not limited to a single victim, or even to a small group. The real success of the plan depended upon defrauding a very large number of businessmen, over an extended period. Accordingly, it was essential to pacify past victims, in order to avert adverse publicity which might warn off prospective future victims and forestall an official investigation which would cut short the fradulent operation.

2. In any event, dismissal of the conspiracy count was error. That charge was grounded not only on the dismissed counts, but also on the remaining counts of the indictment. Accordingly, it was adequately supported. The proper remedy was to limit the government's proof under the conspiracy charge to the offenses alleged in the sustained counts.

ARGUMENT

I. THE DOCUMENTS DESCRIBED IN THE DISMISSED COUNTS WERE MAILED IN EXECUTION OF THE SCHEME TO DEFRAUD AND FALL UNDER THE PROHIBITION OF THE MAIL FRAUD STATUTE

The mail fraud statute (*supra*, pp. 2–3) prohibits the use of the mails "*for the purpose of executing*" a scheme or artifice to defraud. It is not enough that the mailing is somehow connected to a fraudulent plan. The use of the mails must be "a step in [the] plot," *Badders* v. *United States*, 240 U.S. 391, 394, "incident to an essential part of the scheme," *Pereira* v.

United States, 347 U.S. 1, 8. In one way or another, the mailing must *further* the plan.

It follows, of course, that the statute does not reach a purely incidental use of the mails which is a mere by-product of the scheme, contributing nothing to its success. The decisions in *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, 392–393, are no more than applications of this principle. Thus, in *Kann*, the mailing by one bank to another of checks cashed or deposited by the swindlers were held transactions "merely incidental and collateral to the scheme and not a part of it" (323 U.S., at 95), the Court noting that "[i]t was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." *Id.*, at 94. Similarly, in *Parr*, the Court required the dismissal of three mail fraud counts supported only by the mailing of invoices for gasoline and other service station products by the oil company to a school district whose credit card the defendants had improperly used for their own benefit, and the district's mailing of a check in payment of one of these purchases. Here, again, "It was immaterial to them, or to any consummation of the scheme, how the [oil company] * * * would collect from the [District]." 363 U.S. at 393 (brackets in original).[2]

[2] See also, *Stapp* v. *United States*, 120 F. 2d 898 (C.A. 5) (bank transactions after victim's check in oil fraud had been cashed); *Mitchell* v. *United States*, 118 F. 2d 653 (C.A. 10) (victim's mailing of oil lease assignment to land office for recordation after being defrauded); *Dyhre* v. *Hudspeth*, 106

Kann and *Parr* also illustrate another truth: that often, perhaps usually, what happens after the swindlers have gotten their money is harmless, since it does not advance the plan. That is characteristic of "one-shot" swindles, for the defrauder in such cases will normally leave town immediately after putting the money in his pocket, caring nothing how soon the victim discovers his plight. That may sometimes also be true of more complicated schemes, involving many frauds against a single victoim: so long as each transaction is independent of the others, it may not matter to the swindlers what occurs after the particular fraud has succeeded. But if fruition often ends the defrauder's interest in the immediate transaction, it is not always so. Neither *Kann* nor *Parr* erects a mechanical rule that every mailing occurring after the money has changed hands is innocent. On the contrary, in *Kann* the Court expressly excepted from the rule "cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated." 323 U.S., at 94–95.

The real basis for decision in *Kann* and *Parr* was that the mailings involved, over which the defendants had no control, were mere results, in no way advancing the plan. The only rule to be distilled from the cases is that the reach of the federal mail fraud statute is restricted to "those limited instances in which the use of the mails is a part of the execution of the fraud"

F. 2d 286 (C.A. 10) (bank transactions after bad checks had been cashed or negotiated). Cf. *Getchell* v. *United States*, 282 F. 2d 681, 683–688 (C.A. 5).

(323 U.S., at 95), with perhaps a caveat to the effect that mailings occurring after the fruits of the fraud have been obtained will usually, though not always, be deemed to fall outside the ban of the statute.

What, then, of our case? How did the mailings at issue, coming as they did after the victim had given all that was expected of him, further the scheme to defraud? We suggest they advanced the plot in two distinct ways, and that either contribution is sufficient to support the allegation that the described use of the mails violated the statute.

A. LOOKING ONLY TO THE IMMEDIATE VICTIMS, THE MAILINGS FURTHERED THE SCHEME BY THWARTING, DISCOURAGING, OR AT LEAST DELAYING, EFFORTS AT RECOVERY OF MONIES ALREADY PAID OVER

The purpose of a scheme to defraud is not simply to obtain possession of the victim's money; the equally important objective is to retain it. "[T]he scheme described in the indictment was not the bare taking of the money * * *. * * * It encompassed an intention * * * also to keep it. Thus any action on the part of appellant which represented * * * efforts by him to keep the money, constituted activities 'for the purpose of executing such scheme or artifice or attempting so to do.'" *Clark* v. *United States*, 208 F. 2d 840, 841 (C.A.D.C.), certiorari denied, 346 U.S. 865: See also *Blue* v. *United States*, 138 F. 2d 351, 359 (C.A. 6), certiorari denied, 322 U.S. 736; *Davis* v. *United States*, 125 F. 2d 144 (C.A. 6); *Bogy* v. *United States*, 96 F. 2d 734, 740 (C.A. 6), certiorari denied, 305 U.S. 608; *Freeman* v. *United States*, 244 Fed. 1, 9–10 (C.A. 7), certiorari denied, 245 U.S. 654. As *Kann* v. *United States* implies, the scheme in each case reaches fruition only when "[t]he persons intended to receive the

money [have] received it *irrevocably*." 323 U.S., at 94 (emphasis added.)[5]

Here, the first prerequisite to keeping the money was to "accept" the contract. For, until that was done, the victim, under the agreement, could demand a return of his "advance fee." The mailings involved in the dismissed counts accomplished that purpose. Indeed, forwarding an accepted copy of the service agreement was the sacramental mode of cutting off the victim's contractual right to a refund of his money. It is important to stress that these mailings were key features of the entire scheme, planned from the beginning. The "application" itself provided:

> This agreement shall become effective when accepted at any Regional Office of Lenders Service Corporation. Notification of acceptance shall be made by returning to applicant a copy of this agreement executed by duly authorized personnel. In the event this agreement is not accepted by LSC the entire fee will be refunded (R. 51).

In light of this provision, the indictment correctly charged as an essential step in the scheme mailings designed to "inform said victims that they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound

[5] Compare *United States* v. *Riedel*, 126 F. 2d 81, 83 (C.A. 7), cited by the Court as illustrative of the type of case distinguishable from the case before it (323 U.S. at 95, n. 8): "A scheme to defraud may well include later efforts to avoid detection of the fraud. * * * Avoidance of detection and prevention of recovery of money lost by the victims are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself be not ended."

thereby and had no recourse for retrieving his money" (R. 8). Only after notification of acceptance did the swindlers obtain even paper title to the funds. Until then, the fraud was incomplete.

It is not a valid objection that defrauders have no real concern for legal rights. The fact is that the more subtle swindlers commonly disguise their transactions in the trappings of legality, not only to lure their victims, but also to delay discovery and to discourage efforts at recovery. The complex scheme alleged here was well suited to that purpose. Having missed his opportunity to withdraw, the gullible victim might well doubt his legal right to a return of his money after receiving formal notice that his offer had been irrevocably accepted. Even after he had begun to suspect the fraud, the difficulties of proving his case might seem insurmountable. It is not unreasonable to suppose that some victims would think themselves barred by not having acted sooner.

The intent of the defendants so to delude their victims is clear from the letters of instruction which accompanied the accepted contracts. These letters delineated a long procedure for the future. In fact, the scheme did not end with the mailings charged. Several subsequent steps (most, if not all, necessarily involving use of the mails) were still to be taken. Data for a loan application was to be furnished by the victim on a form enclosed with the letters; later, a "proof" of the application would be submitted for approval; it had to be returned; the corrected application would then be submitted to loan companies; and,

presumably, the swindlers were then to notify their victim of the outcome. The fact that, in some instances at least, the swindlers actually intended to go through these formalities, empty motions though they were, shows their concern for putting obstacles in the path of quick recovery.

Depending on the victim, this long-drawn-out procedure might be expected to dupe completely, to discourage legal action, or merely to delay efforts at recovery. Since deceivers reportedly have great capacity for self-deception, we might be justified in attributing to the authors of the fraud very high hopes for their scheme. But, whatever their expectation, it is plain that the mailings described were intended to further a plot to obtain, and retain, unearned fees.

Thus, in the setting of the case, even if we follow the district court in looking only to the individual victim as the object of the scheme particularized in each count, we must conclude that the acts alleged, in each case, supported a charge of mail fraud.

B. CONSIDERING THE CONTINUING NATURE OF THE OVERALL PLAN, THE MAILINGS FURTHERED THE SCHEME BY LULLING PAST VICTIMS INTO INACTION SO AS TO PREVENT DISCLOSURE AND PERMIT THE DEFRAUDING OF FUTURE VICTIMS

Though the district court apparently refused so to view it, the scheme charged was a single elaborate plan to defraud an almost endless number of potential victims. The character of the scheme is sufficiently shown by the long-range preparations and complex organization alleged. As we have noted, corpora-

tions were formed, offices were leased, a force of salesmen was hired and trained, and all manner of literature was prepared. All this, obviously, was justified only if the conspirators contemplated a large-scale operation, covering a wide territory, expected to endure for a considerable period. Real success depended on accumulating a long list of victims from the almost inexhaustible supply of loan-hungry small businessmen.

Given the broad expectation of the plotters, the importance of pacifying old "clients" is apparent. Though nothing further was expected to be got from them, it was essential to forestall the worried inquiries of past victims. For, inevitably, the questions would become complaints, then demands, threats, leading soon enough to the loud wail of cheated customers sensing that they have been duped. And, if the resulting adverse publicity itself did not warn off prospective customers, it would not be long before the conspirators themselves would feel compelled to disband before the approaching arm of the law. Thus, one way or the other, discovery of their plight by those already bilked would cut short the fraudulent scheme.

We suggest no new doctrine. As already noted (*supra,* p. 13), in *Kann,* this Court expressly adverted to a case like this one, in which mailings "after the fact" fall under the statutory prohibition. The courts of appeal have uniformly held the statute applicable to the sending of lulling communications to victims who have already parted with their money for the purpose of concealing a continuing scheme

contemplating the defrauding of large numbers of future victims as well. See, *e.g.*, *United States* v. *Earnhardt*, 153 F. 2d 472, 473–474 (C.A. 7), certiorari denied, 328 U.S. 858; *Marshall* v. *United States*, 146 F. 2d 618, 621 (C.A. 9); *United States* v. *Cohen*, 145 F. 2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799; *Corbett* v. *United States*, 89 F. 2d 124, 126 (C.A. 8); *Lewis* v. *United States*, 38 F. 2d 406, 415–416 (C.A. 9); *Brady* v. *United States*, 26 F. 2d 400, 401 (C.A. 9), certiorari denied, 278 U.S. 621; *Farmer* v. *United States*, 223 Fed. 903, 910 (C.A. 2), certiorari denied, 238 U.S. 638.

Thus, in *United States* v. *Earnhardt*, *supra*, the Seventh Circuit affirmed convictions based upon the use of the mails to deliver the deeds to lands which the victims had purchased in reliance upon false representations that they were oil-bearing, saying (153 F. 2d at 473–474):

> [T]he scheme described was a general and continuing one, the object of which was to reach as many investors as possible, and to defraud them as many times as possible * * *. That, coupled with the fact that the indictment further charged that defendants sought to allay fears and apprehensions as to the safety of their investments in order to prevent possible action on their part, renders the mailings of the deeds essential steps in the execution of the scheme and not just unrelated events occurring after its completion.

Similarly, in *Marshall* v. *United States*, *supra*, a case involving an "advance rental" scheme similar in many respects to the scheme here, the sending of lulling letters to victims whose money the defendants had already received was held to be covered by the statute.

In language as applicable to the present case as to the one before the court, the Ninth Circuit observed (146 F. 2d at 621):

> [W]here the scheme charged in the indictment involves the continuing solicitation of public interest as well as a continuing relationship between schemer and victims and where letters are sent through the mails to further the relationship and to lull the victims into a sense of security and inaction, the mails clearly are used to accomplish the purpose of the scheme, and the essential ingredients of the mail fraud offense are present.

And in *Farmer* v. *United States, supra,* where the defendants were engaged in a large-scale book fraud, the Second Circuit sustained the application of the mail fraud statute to a lulling letter sent to one of the victims after she had parted with her money, saying (223 Fed. at 910):

> If it stood alone, this letter might not be significant, but with the illumination of the situation which the record affords we think it may fairly be considered as written in furtherance of the general scheme. The scheme was not to defraud a particular individual (e.g., Mrs. Preston), but to defraud whomever the parties to the scheme could persuade to buy. Having been once swindled by Glenn Farmer and Hartley, Mrs. Preston and others in Boston to whom she might relate her experience would probably be immune to the further blandishments of these two enterprising agents; but if the man who got up the books and was evidently the head of the enterprise could persuade her that the publishing house knew nothing of Glenn Farmer and his coadjutor in the swindle, except that Glenn had bought books

> from J. J. Farmer and resold them entirely on his own account, possibly Boston might still remain a territory receptive of the J. J. Farmer books, when cultivated by other of his enterprising agents.

These and similar cases, decided both before and since *Kann* v. *United States*, 323 U.S. 88, refute the district court's assumption that, merely because the particular victims named in the dismissed counts had parted with their money when the mailings charged in those counts occurred, the communications were innocent. These mailings, we again emphasize, were essential parts of the plan, contemplated from its inception. At least where the scheme charged is a continuing one designed to mulct as many victims as possible, the mail fraud statute prohibits a use of the mails for the purpose of forestalling discovery so that future victims may similarly be defrauded.[4]

II. THE CONSPIRACY COUNT IS AMPLY SUPPORTED BY THE REMAINING SUBSTANTIVE COUNTS

The dismissal of 34 of the substantive counts, even if correct, did not require striking the conspiracy charge. The conspiracy count (count 44) alleged that the defendants conspired to use the mails in execution of a scheme to defraud, "which said scheme

[4] Cf. *United States* v. *Comyns*, 248 U.S. 349, sustaining an indictment charging use of the mails in execution of an "advance fee" scheme similar to that charged here. The opinion notes that the purpose of the agreements which the defendants entered into with their victims, as alleged in the indictment, was to delay the victims' demands for the repayment of their advance fees and to prevent the victims from "discovering the fact they had been defrauded and disclosing said fact to others" (at 351–352).

* * * and use of the mails in furtherance thereof are described and set forth in the previous counts of this indictment," and, specifically, that they agreed "to place * * * in authorized depositories for mail matter * * * certain letters, circulars and other written and printed matter, all as charged and alleged in the previous counts of this indictment" (R. 31). The mailings charged in all 43 of the substantive counts (in addition to other actions) were alleged as overt acts (R. 32–34).

Thus, the charged objective of the conspiracy included the violations described in the substantive counts which the court sustained (*supra*, p. 9), as well as the mailings involved in the invalidated counts. In these circumstances, there was no sound basis for dismissing the conspiracy count in its entirety. A conspiracy to commit an offense or offenses against the United States is within the prohibition of the conspiracy statute though its objective includes also acts which are innocent. *Allen* v. *United States*, 4 F. 2d 688, 692 (C.A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U.S. 598. Under the court's ruling on the substantive counts, the proper disposition of the conspiracy count would have been to overrule the motion to dismiss, limiting the government's proof to the matter alleged in the remaining portions of the indictment, and treating the rest as surplusage. Cf. *Ford* v. *United States*, 273 U.S. 593, 602; *Salinger* v. *United States*, 272 U.S. 542, 548–549; *United States* v. *Goodman*, 285 F. 2d 378, 380 (C.A. 5), certiorari denied, 366 U.S. 930; *United States* v. *Strauss*, 283 F. 2d 155, 159 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court, insofar as it dismisses all but nine counts of the 44-count indictment, should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, *Appellant*,

v.

RALPH L. SAMPSON, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, *Appellant*,

v.

RALPH L. SAMPSON, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the district court (R. 55-63) is unreported. The opinion of the Court of Appeals for the Fifth Circuit certifying the appeal to this Court (R. 67-70) is reported at 298 F. 2d 826.

JURISDICTION

The judgment of the district court was entered on March 1, 1961 (R. 55, 60, 64). On March 30, 1961, the Government filed a notice of appeal to the Court of Appeals for the Fifth Circuit (R. 65-66). On January 18, 1962, the court of appeals, holding that the judg-

ment dismissing 35 counts of the indictment was based on a construction of the mail fraud statute, certified the appeal to this Court pursuant to 18 U.S.C. § 3731 (R. 67-70, 71). On February 23, 1962, the Government moved this Court to remand the case to the court of appeals. On April 2, 1962, this Court denied the Government's motion and noted probable jurisdiction (369 U.S. 836; R. 72). The jurisdiction of this Court rests upon 18 U.S.C. § 3731.

QUESTIONS PRESENTED

1. Where allegedly there is a continuing plan to extract money from divers persons in personal interviews through false representations, and where in a particular transaction the accused have received the full payment sought from the victim, does a subsequent mailing to a victim enclosing a copy of the contract and discussing its performance, allegedly designed to "lull", constitute a mailing "for the purpose of executing" a scheme or artifice to obtain money by false pretenses within the meaning of the mail faud statute?

2. Does the mail fraud statute extend to a preliminary mailing which contains no false representations and is not mailed in the execution of a fraud or in an attempt?

3. Where certain persons allegedly conspired to defraud divers persons throughout the United States by collecting advance fees for services purportedly to be rendered, and in the conspiracy employed salesmen to make the fraudulent sales in personal interviews with selected victims, was each salesman a participant in and subject to indictment for every mailing in the business which violated the mail fraud statute without regard to whether or not the mailing was connected

with the transactions for which the salesman had any responsibility?

STATUTE INVOLVED

The mail fraud statute (18 U.S.C. § 1341) provides in part:

> "§ 1341. *Frauds and swindles.*
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, . . . *for the purpose of executing such scheme or artifice or attempting so to do,* places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

STATEMENT OF THE CASE

The indictment charges that the corporate defendant and 23 individual defendants "devised and intended to devise a scheme and artifice to defraud" certain named individuals and "numerous and divers persons throughout the United States" (R. 2). The alleged scheme involved inducing the so-called victims to pay "advance fees" for promised services by means of numerous false and fraudulent pretenses, representations and promises (R. 3-14). It is alleged that one of the 16 defendants who were salesmen would "visit personally" each victim at the victim's place of business (R. 5), and that, in the course of this personal interview, the salesman would, by the false represen-

tations enumerated, induce the victim to sign a contract for services relating to a loan for, or the sale of, the victim's business (R. 7). The salesman would obtain the victim's check for the "advance fee" during the course of such personal interview, and "after a salesman had obtained the check and left the place of business of the victim he would immediately take the check to the bank upon which drawn to have the same converted into a Cashier's Check. . . ." (R. 7). The checks were then transmitted to a regional office of the defendant corporation and deposited in the bank (R. 7-8).

Each of the first 43 counts, except counts 40 and 41, charge the mailing of "an envelope and contents" addressed to specified individuals in one of several Southeastern states. Counts 40 and 41 charge defendants with having placed two newspaper advertisements seeking to employ salesmen. Each of the 43 substantive counts charges that all of the defendants caused each mailing.

The district court dismissed thirty-four counts of the indictment which were based on the mailing to a victim of a copy of the accepted contract and a form letter *after* the check for the advance fee had been obtained and deposited as aforesaid (R. 7-8). This mailing is described in the indictment as follows:

> "3. That following the said acceptance of the victims' applications the defendants would mail to said victims a signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said vic-

> tims the valuable services which the defendants had falsely and fraudulently represented that they would perform. That a further purpose thereof was to inform said victims that they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound thereby and had no recourse for retrieving his money." (R. 8.)

Samples of this so-called "lulling" letter and acceptance contract have been incorporated in the record (R. 49-51). The letter enclosed a signed copy of the contract and discussed its performance. When this mailing occurred, the defendants had already obtained the victim's "advance fee" and did not intend to obtain more money from him. Although this is not entirely clear from the Government's statement of the case, it seems to be conceded elsewhere that the victims had "already parted with their money" when the mailings occurred. (Brief for the United States, pp. 2, 5, 7.) Nothing in the indictment suggests that the material mailed to one victim was part of the execution of a fraud against another victim. On the authority of *Kann* v. *United States,* 323 U. S. 88, and *Parr* v. *United States,* 363 U. S. 370, the district court dismissed all counts of the indictment based on these mailings since "the money had already been obtained from such victims prior to such mailings" (R. 60).

The district court did not dismiss seven counts (counts 2, 7, 12, 16, 31, 33 and 38) which were based on the mailing of a certain leaflet to a prospect before a salesman called to present the fraudulent proposal for the sale of services and before any money was obtained from the victim. The leaflet contained a very

brief summary of commercial financing methods and a list of commercial and business affiliations of the defendant corporation. It called for no reply. The detailed charges of misrepresentations made to a victim include no reference to the leaflet. A sample of such leaflet was attached to a "Supplemental Brief" filed by the Government in the district court and is included in the record (R. 52-53).[1]

The district court also declined to dismiss two counts (40 and 41) which were based upon the mailing of newspaper advertisements seeking to employ salesmen (R. 28-30). The advertisements are not alleged to have contained any misrepresentations to customers.

The district court also dismissed count 44, the conspiracy count. Each of the defendants was named in each of the 44 counts. The defendants were the corporate employer, five individuals who served at an overall managerial level (including the three principal organizers, executives and directors of the business), two individuals who served successively as regional director of the Atlanta region, and sixteen salesmen who worked in the area covered by the Atlanta regional office (R. 3). The defendant corporation had its home office in Los Angeles (R. 52) and had regional offices in New York, Chicago, Dallas, Denver and Atlanta (R. 51). Its salesmen worked on a "straight commission" and called on prospects in several southeastern states whose names were furnished to them (R. 29, 30). It is not alleged that the salesmen had any financial

[1] Defendants make no point of the fact that this leaflet is not described in the indictment (except insofar as this may indicate its lack of significance in the alleged scheme), but treat the issue as if the mailings of these leaflets had been specifically charged in the indictment.

interest or responsibility beyond the sales which each made. The mailings alleged were addressed to victims in the States of Georgia, South Carolina, North Carolina, Florida, Alabama, Mississippi and Kentucky (R. 14, 16, 18, 19, 20, 26). All of the defendants, including the salesmen, are charged with having caused the mailing alleged in each substantive count, including the newspaper advertisements referred to in counts 40 and 41.

SUMMARY OF ARGUMENT

1. The district court properly dismissed the 34 counts which were based on mailings by defendants after they had received all the money they expected to receive from a victim. The mail fraud statute prohibits any mailing "for the purpose of executing such scheme or artifice or attempting so to do." A scheme or artifice to obtain money by false pretenses is executed when the fruits of the fraud come into the possession of the wrongdoer. The offense of fraud is committed at the time of the wrongful conversion and cannot be undone. A subsequent mailing which may have a tendency to lull or pacify is not "for the purpose of executing" the fraud within the meaning of the statute.

Although a mailing after conclusion of a fraudulent transaction may under certain circumstances be for the purpose of executing a second fraudulent transaction, no such circumstances existed in this case. Each fraudulent transaction was aimed at a different victim. The "lulling" of one victim had only the most remote and speculative relationship, if any, to the fraud on a subsequent victim, and thus was not a part of the execution of a subsequent fraud on another victim.

The narrow scope of the mail fraud statute is emphasized when its requirement that a mailing be "for the purpose of executing" a fraud is contrasted with the broader language of certain recent statutes, particularly one statute which prohibits certain acts "in the execution *or concealment*" of a scheme to defraud. It is also highly significant that in 1961 Congress declined to include fraud and false pretenses within the coverage of an extremely broad statute prohibiting mailings which "facilitate" certain unlawful businesses.

2. A mailing in the business of the defendant corporation which was at most preparatory was not "for the purpose of executing" the fraud or "*attempting* so to do." There cannot be an attempt to obtain money by false pretenses unless some false pretenses have been made. Defendant corporation's newspaper advertisements soliciting salesmen for employment were not attempts to obtain money by false pretenses. The same is true of a brief leaflet on commercial lending transactions which was sent before any salesman called on the customer. The leaflet contained no offer nor did it call for any reply.

The Government ignores the limitations of the mail fraud statute and seeks in effect to extend it to cover any mailing in the course of defendants' business, or, as the Government would express it, which advances its long range plans. Such broad extension of Federal jurisdiction in fraud cases would be contrary to the intent of Congress.

3. Dismissal of the conspiracy count should be upheld on two separate and unrelated grounds.

(a) None of the substantive counts on which the conspiracy count is based charges a Federal offense under the mail fraud statute. The conspiracy count, therefore, cannot stand.

(b) All of the 43 so-called substantive counts are in reality conspiracy counts which duplicate each other and count 44, the conspiracy count. Each "substantive" count alleges a conspiracy and charges all defendants *as a group*. Under no reasonable theory of vicarious responsibility could each of the 16 salesmen, who had very limited financial interest and responsibility in the enterprise, be punished for the substantive offenses arising from the employer's use of the mails (1) in advertising for salesmen, (2) in sending preliminary materials to a prospect with whom the salesman had no remote connection, or (3) in mailing copies of the contract and other papers to a victim with whom the salesman had no remote connection. When challenged by a motion for a bill of particulars, the Government elected in the district court to stand on each of these counts as drawn. Since each such count is dependent upon showing the mass conspiracy rather than the individual responsibility of each defendant, they are duplicative of each other. The district court granted limited relief by dismissing only the conspiracy count. Proper procedure would be to require the dismissal of all such counts but one. Otherwise, the practical effect of these 44 mass conspiracy counts would be to deny an individual salesman all possibility of presenting an independent defense or having a fair trial.

ARGUMENT

I.

IN EACH OF THE DISMISSED SUBSTANTIVE COUNTS, THE USE OF THE MAILS AFTER THE RECEIPT OF THE FRUITS OF THE FRAUDULENT TRANSACTION WAS NOT IN EXECUTION OF THE SCHEME OR ARTIFICE TO DEFRAUD WITHIN THE MEANING OF THE MAIL FRAUD STATUTE.

The wrongful extraction of money alleged in each count of the indictment dismissed by the district court occurred at the conclusion of a personal interview between a defendant salesman and an alleged victim, in the course of which numerous misrepresentations were made. Since each of these counts depended upon a mailing made subsequent to the wrongful extraction of the money, the district court concluded in reliance on *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, that the mailing was not "for the purpose of executing such scheme or artifice or attempting so to do" within the meaning of the mail fraud statute (R. 60). It is the position of the defendants that the scheme or artifice was executed when the offense of fraud was consummated by the wrongful extraction of money and, therefore, that the action of the district court was correct. This Court so held in *Kann* and *Parr*.

The particular mailing in question was sent by the defendants to a customer after defendants had received all the money sought from the customer (R. 7-8). The letter (R. 50) enclosed an accepted copy of the contract (R. 51) which had been signed by the customer during the personal interview with the salesman (R. 6-7), and it also enclosed some forms to be sent by the customer to his banker, his accountant, and two suppliers. Allegedly, the letter also put the customer on notice that he could not secure a refund of the fee (R. 8), whereas the salesman allegedly had led him to

believe that his fee would be refunded if a loan were not obtained (R. 11).

The Government's arguments regarding this mailing are in the alternative. The first phase of its argument apparently assumes for purposes of the argument that the statutory reference to the execution of a scheme or artifice to defraud or obtain money by false pretenses contemplates the execution or consummation of a particular fraudulent transaction.[2] To this extent, this assumption adopts the rule laid down in *Kann* and *Parr*. Proceeding on this assumption, the Government argues in effect that the mailing of the notification of acceptance was necessary to complete the execution of the fraud because until then the victim had a contractual right to a refund of his money and the defendants had not received the money "irrevocably." It states:

> "Indeed, forwarding an accepted copy of the service agreement was the sacramental mode of cutting off the victim's contractual right to a refund of his money . . . ."
>
> "Only after notification of acceptance did the swindlers obtain even paper title to the funds. Until then, the fraud was incomplete." (Brief for the United States, pp. 15, 16.)

The second phase of the Government's argument rests upon the assumption that the reference in the mail fraud statute to the execution of "any scheme or arti-

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[2] This is the phase of the Government's argument ending on page 17 of its brief with the following:

> "Thus, in the setting of the case, even if we follow the district court in looking only to the individual victim as the object of the scheme particularized in each count, we must conclude that the acts alleged, in each case, supported a charge of mail fraud."

fice" to defraud or obtain money by false pretenses is not confined to the commission of a single offense against a particular victim but can encompass activities over a long period of time carrying out "a single elaborate plan" to perpetrate many frauds against divers persons (Brief for the United States, p. 17). The term "scheme or artifice" as used in the statute is thus construed by the Government in this case as including the entire plan of operations of the defendants extending from before March 9, 1956 to June 1, 1959, *i.e.*, a prolonged conspiracy. Operating upon this legal assumption, the Government makes the further legal assumption that a mailing which aids in carrying out the entire plan of operations is a part of the execution of the plan and within the prohibition of the statute. On the basis of this construction, the Government then argues that the mailings in question were a part of the entire plan of operations because they were in each instance intended to "lull" the victim and thus avoid discovery (Brief for the United States, p. 18). It argues that discovery would lead to complaints and adverse publicity warning off prospective customers or causing a cessation of business to avoid "the approaching arm of the law." Thus, it concludes that the alleged "lulling" was for the purpose of concealing the crime and permitting the defrauding of further victims.[3]

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[3] While this is not the place to argue the merits, we find difficulty in accepting some of the inferences in the Government's brief. If the customer had been told he would get a refund of his fee if no loan were made, a letter advising him to the contrary would not be a concealment. On the contrary, it would constitute a prompt announcement that he had been misled on this point. Moreover, a direction to the victim to call the transaction to the attention of his banker and accountant, the two sources most likely to recognize a fraud and know what to do about it, is not a concealment.

Instead of looking to each basic transaction of fraud and the use of the mails in the *execution* of the scheme to commit such fraud, the Government in the second phase of its argument looks to the entire *plan* or *conspiracy* to commit divers frauds on "an almost endless number of potential victims" for more than three years (Brief for the United States, p. 17). This is to be distinguished from the first phase of its argument to the effect that the mailings were made "for the purpose of executing" a particular fraud. In both of its arguments, the Government avoids the statutory phrase "for the purpose of executing" and argues instead that the mailings "advanced the plot" and "furthered the scheme" (Brief for the United States, pp. 10, 13, 14). At this point an analysis of *Kann* and *Parr* will show that both of these arguments have already been fully considered and rejected by this Court.

The decisions in Kann and Parr

In both *Kann* and *Parr* the indictment alleged, as it does in the present case, a "continuing scheme" to defraud. The duration of the scheme in *Kann* was more than a year and in *Parr* more than four years.

In *Kann* the indictment charged a scheme to defraud a corporation (Triumph) and its stockholders through the diversion of its profits to the defendants. In one count, the Government relied on the mailing of a check given to defendants by an innocent contractor, who was doing work for Triumph, in payment for certain timber which defendants represented they owned but which in fact was owned by Triumph. The contractor was expected to secure reimbursement for this payment as an item of cost under his contract with Triumph. The Government relied on the mailing of

the check by the bank at which defendants cashed it to the bank on which it was drawn. In the other count, Elk Mills (in which the victim Triumph had a 51% interest) delivered a $5,000 check on its bank to one of the defendants who, after endorsing it, deposited it for credit to his account in another bank, following which the check was cleared through the mails. This check represented profits of Triumph which had been wrongfully diverted to Elk Mills pursuant to the scheme to defraud. In both instances the defendants, though they had received payment, were necessarily dependent upon the clearance of the checks in question. In the first instance, for example, the receipt of the payment from the innocent contractor was but a precedent to the next important step—the collection by the contractor from Triumph, the ultimate victim. Any disturbance of this contemplated procedure could have brought inquiry which would have put Triumph on notice of the continuing frauds. The offense of fraud, however, had been committed and brought to consummation upon the receipt of the money.[4]

Likewise, in *Parr*, the defendants' receipt of the filling station products and services described in counts 17, 18 and 19 of the indictment constituted in each instance the consummation of the underlying crime of fraud or receipt of money or property by false pretenses. The security of the defendants in

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[4] The general rule is that the offense of obtaining money or property by false pretenses occurs when the money or property is wrongfully converted to possession by the wrongdoer. See, *e.g.*, *Updike* v. *People*, 92 Colo. 125, 18 P. 2d 472; *Green* v. *State*, 52 Ga. App. 18, 182 S.E. 74; *People* v. *Shapiro*, 299 Ill. App. 255, 20 N.E. 2d 107; *State* v. *Hartman*, 364 Mo. 1109, 273 S.W. 2d 198; *State* v. *Whitledge*, Mo. Sup. Ct., 269 S.W. 2d 748; *Schoenbeck* v. *State*, 163 Tex. Crim. App. 14, 288 S.W. 2d 121.

carrying out their continuing conspiracy to defraud the school district depended, of course, upon the undisturbed sending of bills by the oil company to the school district, the ultimate victim, and the return of checks from the victim to the oil company. The underlying crime of fraud, however, was fully executed and irrevocably committed when the property was wrongfully received by the defendants.

In both *Kann* and *Parr*, this Court, after stating that the mail fraud statute reached "only those limited instances in which the use of the mails is a part of the execution of the fraud," held as follows:

> "We hold, therefore, that one element of the offense defined by the statute, namely, that the mailing must be for the purpose of *executing the fraud*, is lacking in the present case. The judgment must be reversed." *Kann* v. *United States*, 323 U.S. 88, 95. (Emphasis added.)

A preliminary point considered by the Court in *Kann* was whether the defendants could be deemed to have received payment when they deposited or cashed each fraudulently obtained check. Defendants argued that this was so because the check then became "irrevocable as respects the drawer." 323 U.S., at 93. In upholding this position the Court stated:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably." 323 U.S., at 94.

The checks had been irrevocably converted into cash or credits for the uses of the defendants despite their clear civil liability to repay the money. When the checks were converted, it passed beyond the power of

the defendants to undo the crime. The fraud was therefore executed.[5]

In *Parr*, this Court relied squarely on the holding of the *Kann* case in reversing convictions on counts 17, 18 and 19, where in each count the mailing consisted of a bill to the school district for the fraudulently obtained gas and service or a check from the school district in payment of such bill. As in *Kann*, the decisive point was that the mailing came after the wrongful receipt of the fruits of the fraud. This Court quoted the holding in *Kann* that the mailing must be "a part of the execution of the fraud." 363 U.S., at 394. In both instances, the fraud was executed when the defendants received the fruits of the fraud, and the commission of the underlying crime of fraud was in no wise dependent upon the subsequent collection of the money from the intended victim, which in *Kann* was Triumph, and in *Parr* was the school district.

Nothing in the Court's dictum in *Kann* distinguishing cases that would not be governed by the decision is inconsistent with the rationale that mailings subsequent to the execution of the fraud are not a part of its commission. The Court made the following distinctions:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofskey*, 243 U.S. 440. Also to be distinguished are cases where the use of the mails is a means of concealment so that further

[5] The opinion of the Court in *United States* v. *Kenofskey*, 243 U.S. 440, 443, quotes the acknowledgment of the Government that "The most vital element in the transaction . . . [was] . . . the payment and receipt of the money . . . . " The Court added, "Such payment and receipt would indeed have executed the scheme . . . . "

frauds which are part of the scheme may be perpetrated." 323 U.S., at 94-95.

The second distinction in the foregoing quotation, referring to "further frauds", covers instances where a mailing is part of the execution of a continuous fraud, such as check kiting, or where a mailing subsequent to one fraud contributes to the execution of further frauds upon the victim. See, for example, *United States v. Lowe,* 115 F. 2d 596 (7th Cir.), cited in the *Kann* dictum, where the defendant was able to maintain a credit at a bank through the fraudulent use of a check kiting scheme. The maintenance of the credit depended upon the time consumed in clearing checks through the mails, and was a continuous fraud against the bank extending over such period of time as the credit existed. Similarly, in *Dunham v. United States,* 125 F. 2d 895 (5th Cir.), also cited in the *Kann* dictum,[6] one of the purposes of the mailings to victims, as the defendant himself testified, was "in order to get new money" from them. 125 F. 2d, at 896.

The Government argued in *Kann* that the conspiracy of the defendants encompassed further frauds and that the clearing of the checks (such as the check of the innocent contractor who later was to bill the victim) was a contemplated part of the entire plan. In response to this argument, the Court said:

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[6] A third case cited by the Court, *United States* v. *Riedel,* 126 F. 2d 81 (7th Cir.), is not on its face pertinent to the Court's dictum regarding "further frauds", because the facts reported in that decision do not show that any "further frauds" were involved. Moreover, six of the nine counts in *Riedel* were based on violations of the Securities Act of 1933 (48 Stat. 84 (1933), 15 U.S.C. § 77q (1958)), which does not require that a mailing be "for the purpose of executing" a fraud. But cf. *Getchell* v. *United States,* 282 F. 2d 681 (5th Cir.).

> "The Government argues that the scheme was not complete, that so long as Elk Mills remained a sub-contractor the defendants expected to receive further bonuses and profits and that the clearing of these checks in the ordinary course was essential to its further prosecution. But, even in that view, *the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud,* and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." 323 U.S., at 95. (Emphasis added.)

This response clearly illuminates the Court's construction of the statute as not extending to mailings which, though related to a particular offense, occur after it has already been committed.

Both *Kann* and *Parr* make it clear that even where the plans of the accused contemplated successive frauds against the same victim, a mailing is not a part of the execution of a later fraud merely because it is essential to the plan to conceal an earlier fraud. For example, in *Parr* it was essential to the defendant's plan that the oil company send the bill to the school district, the ultimate victim, and that it be paid. This, however, was not sufficient to make such mailing a part of the execution of further frauds within the meaning of the statute.

Application of Kann and Parr to the present case

The indictment in the present case clearly charges that an offense of fraud or obtaining money by false pretenses was committed when the defendants received a victim's money. As noted in *Kann* and *Parr,* "The persons intended to receive the money had received it

irrevocably." This statement is equally applicable here since the victim here could not have stopped payment on his check after it had been converted into a cashier's check and cashed. Thus the money had been taken wrongfully with the intent of keeping it, and the offense of obtaining money by false pretenses had been executed and could not be undone. The present case, therefore, is squarely covered by the holding in *Kann* and *Parr* that a use of the mails subsequent to the execution of the underlying offense of fraud is not "for the purpose of executing such scheme or artifice" and thus is not within the prohibition of the mail fraud statute.

The Government argues first that the present case may be excepted from this rule because the defendants did not receive the money irrevocably or complete the fraud until the notice of acceptance of the contract was mailed to the alleged victim (Brief for the United States, pp. 15-16). Whether there was or was not a contract between the parties was merely incidental to the offense of fraud. In either case there arose immediately a civil liability to restore the monies. It seems almost a confession of error for the Government to make the argument that the mailing in question was necessary to complete the fraud by giving the defendants "paper title." "Paper title" is merely a selected expression to get around the critical fact that the fruits of the fraud had been irrevocably converted to the possession of the accused.

The lower court cases cited by the Government (Brief for the United States, p. 14) for the proposition that the statute prohibits mailings relating to the retention of money after the execution of the fraud were, with one exception, all decided before *Kann* and, to the ex-

tent they support the Government's argument, are simply irreconcilable with *Kann* and *Parr*. As in certain other lower court cases dealing with the mail fraud statute, the emphasis in these decisions was put on the reprehensible nature of the swindle which had been perpetrated and the limitations of the statutory language were made secondary. This temptation was noted and resisted in the *Parr* case where the majority opinion stated:

> "But the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." 363 U.S., at 393-94.

Equally untenable is the second phase of the Government's argument that in the present case the "scheme or artifice to defraud, or for obtaining money by means of false . . . pretenses," within the meaning of the statute, encompasses "a single elaborate plan" extending over a period of more than three years, and that any mailing which pacified or lulled one already victimized tended to delay discovery and apprehension by the authorities and so permit the continuation of the fraudulent plan.

By no stretch of the imagination can mailings which tend to delay or prevent discovery and apprehension of an earlier fraud be considered a part of the *execution* of a later fraud against another person merely because, the Government infers, complaints *might* lead to "adverse publicity" which *might* "warn off prospective customers" or *might* cause "the conspirators . . . to

disband before the approaching arm of the law" (Brief for the United States, p. 18). It would be a simpler statement of the Government's case to say that any mailing which is used or contemplated in a swindler's effort to avoid arrest after the commission of a fraud contributes to and, therefore, is a part of the execution of further frauds which would probably be prevented if the swindler received adverse publicity and was sent to prison or forced to flee.[7]

Although the mailings in *Kann* and *Parr* were not actually made by the defendants, though caused by them,[8] their interruption or disturbance would have been more likely to expose the defendants and to prevent further frauds than in the case of the mailing here. For example, in the *Parr* case, the mailing and payment of the bill was essential to place the burden on the ultimate victim. A complaint regarding the propriety of billings or a failure to mail a check to the oil company in payment of the bill could readily have led to exposure of the fraud and its termination. It is more speculative that the complaint of a victim under the allegations of the present case would have affected continued operations. In fact, it is alleged in the present

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[7] In a somewhat comparable situation this Court held that attempting to conceal a conspiracy did not itself constitute a conspiracy. *Grunewald* v. *United States*, 353 U.S. 391.

[8] The Government has successfully argued in many cases that one who commits acts which, in the normal and contemplated course of events, result in the use of the mails "knowingly causes" the mails to be used within the meaning of the mail fraud statute, and without regard to the presence of the element of agency. *Pereira* v. *United States*, 347 U.S. 1, 8-9; *United States* v. *Kenofskey*, 243 U.S. 440, 443. We are confident that the Government does not want to question this rule in attempting to distinguish the present case from *Kann* and *Parr*.

case that there were complaints and that the business continued nevertheless (R. 9).

For authority to support this phase of its argument the Government again relies on certain lower court decisions (Brief for the United States, p. 19), most of which precede *Kann*. Its only cited case on "lulling" subsequent to *Kann* (not including *Marshall v. United States*, 146 F. 2d 618 (9th Cir.), in which the decision was handed down 26 days after *Kann* without any recognition of the earlier case) is *United States v. Earnhardt*, 153 F. 2d 472 (7th Cir.), in which the present question was not squarely raised because, as expressly noted by the Court, the mailing was part of an effort to defraud certain investors as many times as possible by continuing misrepresentations. Moreover, support for the Government cannot be found in the cited case of *Corbett v. United States*, 89 F. 2d 124 (8th Cir.), and perhaps not in *Lewis v. United States*, 38 F. 2d 406 (9th Cir.). The court in *Corbett* stated:

> "As said in the McNear Case, supra, relied upon by appellant, 'A letter is violative of the statute, if its tendency is to lull the recipient into a false sense of security, *as a means of inducing or encouraging him to make further payments as contributions to a fraudulent scheme.*' It is equally violative of the statute to cause a banker to mail a letter when its tendency would be to encourage him to make further loans upon forged bonds and thus contribute to the furtherance of a fraudulent scheme." 89 F. 2d, at 126. (Emphasis added.)

To the extent that other lower court cases may be found which are more in point, they rely upon any mailing in carrying out an overall plan of operations, emphasizing the perfidy of the swindlers and the helplessness of victims, and giving no attention to the limited scope of the

statutory prohibition which, as noted in *Kann* and *Parr*, is that the mails not be used in *execution* of the offense of fraud.

The Government can find little, if any, support in the dissents in *Kann* and *Parr* for either of the alternative positions which it asserts here. The dissenting Justices in *Kann* emphasized first that the defendants had received only a conditional credit or payment until Triumph, the ultimate victim, was defrauded, and that the mailing was therefore an essential step in defrauding Triumph. In the present case, however, the customer was victimized and the money fraudulently extracted from him before the mailing in question. A second ground for dissent noted in *Kann* was that each of the frauds was against the single victim Triumph so that the successful use of the mails with respect to each earlier fraud was essential to the commission of later frauds. Nothing in the indictment in the present case suggests that the material mailed to one victim in any way was part of the execution of the offense upon another customer and, in fact, the contrary is clearly indicated.

Even less comfort can be found by the Government in the dissent in *Parr* respecting the counts pertinent here, *i.e.*, counts 17, 18 and 19. Most important in the *Parr* dissent is the fact that the dissenting Justices approved the decision in *Kann* in the following words:

> "Second, it is urged that, under the rationale of *Kann v. United States*, 323 U.S. 88, the mailings, even if caused by petitioners, were not in execution of a scheme to defraud because the scheme was consummated once they received the gasoline. *Kann v. United States found an appropriate instance of such a limitation.* ... ." 363 U.S., at 404. (Emphasis added.)

Thus, in 1960, we have the full Court's approval of the earlier decision in *Kann*. The further statement of the dissent is not inconsistent with defendants' position in the present case. The dissent continued:

> "... but it also expressly excepted from the force of the rule situations in which the subsequent mailing has the function of affording 'concealment so that further frauds which are part of the scheme may be perpetrated,' *supra*, [323 U.S.] at 94-95. Here the jury might properly have found that consumption of gasoline for private purposes was but one device of petitioners for turning their control of the District to their personal advantage, and that the continuing presentation and payment of the bills, and not merely the receipt of the gasoline, was the purpose of the scheme." 363 U.S., at 404.

We understand this portion of the dissent to be based on the existence of a continuing series of closely related frauds against the same victim the objective of which was not merely to obtain gasoline from the oil company but to obtain payment of the bills by the ultimate victim. The rationale of the dissent strongly supports the defendants in the present case since before the mailing there was a single irrevocable extraction of all money sought from the ultimate victim.

Construction of the mail fraud statute and related statutes

It is axiomatic that criminal statutes are to be strictly construed, since "the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95. The principle thus stated by Chief Justice Marshall over a century ago has been consistently adhered to by this Court. *Yates v. United States*, 354 U.S. 298, 304. In *Kordel v. United States*,

335 U.S. 345, 348-49, the Court stated the principle as follows:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States v. Resnick*, 299 U.S. 207; *Kraus & Bros. v. United States*, 327 U.S. 614-622), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States v. Sullivan*, 332 U.S. 689, 693; *Winters v. New York*, 333 U.S. 507."

The present case concerns not merely the "boundaries of prohibited action," but the boundaries of Federal jurisdiction as well. If a similar state statute were before a state court, the issue would be merely whether the legislature clearly intended to punish the activities in question. Here, this issue includes the further question of how far Congress intended to extend the boundary of its jurisdiction over fraud.

In the *Kann* case, this Court found an ascertainable boundary in the statutory requirement that a mailing must be "for the purpose of executing" a fraudulent scheme, stating:

> "The federal mail fraud statute does not purport to reach all frauds, but only those *limited instances* in which the use of the mails is a part of the *execution* of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S., at 95. (Emphasis added.)

By resort to such vague terms as "lulling and concealment", the Government now seeks to extend the boundary to a degree which cannot be precisely anticipated, but which is well beyond the "limited instances" referred to in *Kann*. It should be noted, too, that this

extension would not be limited to mail fraud alone, because in 1952 Congress enacted a similar statute prohibiting the use of telephone and telegraph facilities "for the purpose of executing" a fraudulent scheme.[9] Thus, any extension of the mail fraud statute would necessarily carry with it a comparable extension where telephone and telegraphic communications were involved. In view of the wide use of the mails and even wider use of telephone communications in almost every business and financial transaction, the Government's loose interpretation of the statute would give rise to Federal jurisdiction in almost all cases where fraud is charged. Any businessman accused of misrepresentation by a dissatisfied customer would face a potential Federal charge if he "lulled" a customer by writing or telephoning him seeking to persuade him that there had been a misunderstanding, or that the goods or services measured up to what had been represented. Any attempt to perform a contract for services, if fraudulent misrepresentations were charged, would be considered "lulling" and, logically, the better the performance the greater the tendency to lull. In fact, almost any communication between a defendant and his accuser could in some loose sense be considered as lulling or concealment. Prosecution would depend more on the prosecutor's discretion than upon statute. Where a line might ultimately be drawn cannot be predicted, but certainly Federal jurisdiction would embrace far more than what this Court has heretofore referred to as "limited instances" of Federal jurisdiction in fraud cases.

It is no answer for the Government to say that it would not propose to assert its jurisdiction over every alleged state offense of fraud where the mails or wire

[9] 18 U.S.C. § 1343 (1958).

communications might later be used for the purpose of "lulling" or pacifying a customer. The question is whether it can be reasonably supposed, in the absence of clear language, that Congress intended to extend Federal jurisdiction to such cases.

Congress constantly reviews Federal coverage of criminal activities involving interstate transportation and communication, and frequently adds new crimes or broadens the application of existing statutes where the need is clear.[10] It has repeatedly dealt with particular types of mailings.[11] Yet in the course of this continual process of re-examination, which has been quite intensive in the past two decades, no effort has been made to extend the application of the mail fraud statute beyond the existing limitations as indicated in the *Kann* case. Moreover, Congress has often considered the aspect of concealment and flight in connection with various statutes dealing with the use of the mails and

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[10] Among many examples are the following: 18 U.S.C. § 1343, relating to fraud by wire, radio or television, was enacted on July 16, 1952 and amended on July 11, 1956, 70 Stat. 523; 18 U.S.C. § 1403, relating to use of comunications facilities in narcotics offenses was enacted on July 18, 1956, 70 Stat. 573; 18 U.S.C. § 2314, relating to transportation of stolen goods and securities, was amended on July 9, 1956, 70 Stat. 507 and on October 4, 1961, 75 Stat. 802; 15 U.S.C. § 1171 relating to transportation of gambling devices was enacted on January 2, 1951, 64 Stat. 1134; 15 U.S.C. § 77q., relating to fraudulent sales of securities, was amended on August 10, 1954, 68 Stat. 686; 18 U.S.C. § 1201, relating to kidnapping, was amended on August 6, 1956, 70 Stat. 1043.

[11] See, *e.g.*, 18 U.S.C. § 876, mailings relating to kidnapping and extortion; 18 U.S.C. § 1302, mailings concerning lotteries; 18 U.S.C. § 1403, mailings and other communications relating to narcotics matters; 18 U.S.C. § 1461, mailings of obscene or crime-inciting matter; and 18 U.S.C. §§ 1714-1717, mailings of firearms, explosives, poison, treasonable matter and other matters.

interstate transportation, and where Congress has intended to use its power over interstate transportation and the mails to reach acts of concealment or flight following the commission of a state crime, it has done so by clear and unmistakable language.[12]

In 1956, for example, Congress adopted legislation aimed at swindling schemes involving, among other things, interstate travel to provide a delay during which the swindler could escape following the fraud.[13] To reach this evil, Congress closely followed the language of the mail fraud statute but expressly added acts of concealment. This statute provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution *or concealment* of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more . . . [shall be punished as prescribed]." (Emphasis added.)

It is also significant that, two days after the enactment of the above statute, Congress amended the "wire fraud" statute referred to above and expanded it in one particular but did not broaden it by reference to

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[12] See, *e.g.*, 18 U.S.C. §§ 1071-1073, dealing with fugitives from justice; 18 U.S.C. § 2312, dealing with transportation of stolen vehicles; 18 U.S.C. § 2313, dealing with sale, receipt or concealment of stolen vehicles; 18 U.S.C. § 2314, dealing with transportation of stolen goods, including securities, and also with transportation of persons in the concealment of fraudulent schemes.

[13] 70 Stat. 507, July 9, 1956, amending 18 U.S.C. § 2314.

communications for the purpose of concealment.[14] The statute, as amended, now provides that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds *for the purpose of executing* such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

Thus, within a period of two days, Congress considered two similar statutes, both relating to fraudulent schemes. One statute repeated the narrow requirement of the mail fraud statute that a mailing be "for the purpose of executing" a scheme; the other statute expanded this language to include acts "in the execution or concealment" of a scheme. Since both statutes were considered contemporaneously, the omission of the word "concealment" from the 1956 amendment to the wire fraud statute indicates that Congress did *not* intend for that statute, or the companion mail fraud statute, to cover communications for the purpose of concealment.

A significant extension of Federal criminal jurisdiction occurred in 1961 with the enactment of an amendment to the so-called anti-racketeering statute (18 U.S.C. § 1952 (Supp. III, 1962)). The very broad and comprehensive language of this 1961 statute prohibits, among other things, mailings or interstate transportation to "facilitate the promotion, management, establishment or carrying on" of certain defined "un-

[14] 70 Stat. 523, July 11, 1956, amending 18 U.S.C. § 1343.

lawful activities". The statute thus reaches mailings which merely "facilitate" the "promotion" of the evils sought to be curbed. The statute also prohibits use of the mails or interstate transportation to "distribute the proceeds" of an "unlawful activity" (untaxed liquor, gambling, prostitution, extortion). It is significant that the possibility of including fraud among the unlawful activities was discussed in the hearings before the Senate Judiciary Committee, but the Department of Justice representative indicated that this was not desired.[15] A similar bill introduced earlier by Senator Keating, which would have expressly included fraud, has never been acted upon. (See Appendix, p. 47.)

Thus, in 1961, the Department of Justice declined to seek from Congress legislation which would by express language broaden Federal jurisdiction over state fraud matters; yet, the Government in this case seeks to obtain from this Court an extension of its jurisdiction over fraud, nominally as a "construction" of existing narrow statutory language. Clearly, if the existing statute is too narrow, the remedy is with Congress, especially in view of the policy question involved as

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[15] Herbert J. Miller, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, stated:

> "When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offense[s], then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government." *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 113 (1961).

to the need and wisdom of the extension of Federal police power.

A final reason to reject the particular expansion of statutory language here sought by the Government is that efforts to conceal may continue indefinitely, thus indefinitely extending the statute of limitations. Many years after the conclusion of the state offense of fraud, and long after the running of the state statute of limitations, a mailing or telephone call for purposes of lulling would be a new Federal crime.[16] The comments of Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, are pertinent in this regard. In rejecting the Government's argument in that case that every conspiracy by implication includes a secondary conspiracy to conceal the primary conspiracy, Justice Jackson pointed out that such reasoning

> ". . . would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibilty, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.
>
> "I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. It either adds a new crime or it extends an old one . . . But it is well and wisely settled that there can be no judge-made offenses against the United States and that every Federal prosecution must be sustained by statutory authority. . . .
>
> ". . . We should disapprove the doctrine of im-

[16] In *Clark* v. *United States*, 208 F. 2d 840, cited by the Government, a defendant was convicted of mail fraud for a mailing occurring about ten years after commission of the fraud.

plied or constructive crime in its entirety and in every manifestation." 336 U.S., at 456-57.

No doubt one who commits a crime generally makes efforts to avoid detection. However, it has never been suggested such efforts constitute a new crime unless made so by clear and express language.

II.

THE CONSPIRACY COUNT WAS PROPERLY DISMISSED.

The primary ground for upholding dismissal of the conspiracy count is that none of the substantive counts upon which it is dependent charge a Federal offense. A secondary ground, and the ground upon which the dismissal of this count by the district court was apparently based, is that it merely duplicates the so-called substantive counts which themselves are in fact conspiracy counts.

Defendants took the position, below, and still maintain, that none of the so-called substantive counts charge a Federal offense. If this is correct, then the action of the district court in dismissing the conspiracy count must be upheld because the objective of the conspiracy charged in count 44 consisted of the mailings charged in the other counts.

In the substantive counts not dismissed below, the particular mailings charged to have been made in the execution or attempted execution of the scheme or artifice to obtain money by false pretenses consisted of the following: (1) two newspaper advertisements seeking to employ salesmen (counts 40, 41); and (2) a leaflet mailed by defendants to a prospect before a salesman called containing a summary of various methods used in commercial financing and a list of institutions or associations with which the company had business or

commercial relations[17] (counts 2, 7, 12, 16, 31, 33 and 38). We submit that these mailings were at most merely preliminary and preparatory and did not constitute a part of the *execution* of the alleged scheme or artifice to obtain money by false pretenses or of an *attempt* to do so.

Although the second ground for upholding dismissal of the conspiracy count is an alternative one, and would presumably not be reached unless one or more of the so-called substantive counts were upheld, we feel nevertheless that it raises questions of grave import involving the use or abuse of multiple conspiracy counts under the guise of substantive counts.

A. Mailings which are preliminary to the execution or attempted execution of a scheme to defraud by oral misrepresentations are not covered by the mail fraud statute.

The classification of an act of mailing as criminal or non-criminal under the Federal law must necessarily be determined as of the moment of mailing though, of course, subsequent events may be referred to in ascertaining intent. If defendants had ceased business immediately after the insertion of the newspaper advertisements in question, could each mailing of a newspaper containing no false representations to prospective customers conceivably constitute a Federal offense? Furthermore, if defendants had mailed to a businessman the harmless leaflet containing a brief description of commercial financing, and no salesman ever

[17] Except with respect to the newspaper mailings, all substantive counts charge that the mailing constituting the Federal offense was "for the purpose of executing said scheme and artifice and attempting to do so." The two newspaper counts charge only that the newspaper was mailed "for the purpose of executing said scheme" and no reference is made to attempt. The distinction must be noted, but we have no explanation for it.

called upon the prospect, could each such mailing constitute a Federal offense?

We recognize that it is not necessary for the Government to allege the successful execution of a fraud. We do contend, however, that it must show, at the least, that the mailing was a part of an attempt to commit the offense. In the statutory expression "for the purpose of executing such scheme or attempting so to do," the words "or attempting so to do" serve little purpose except to make it clear that the fraud need not be successful and that no mailing is included unless it has at least reached the status of an attempt to defraud. The question then is whether the preliminary mailing in each of the counts in question had reached the status of an attempt to commit the offense or was merely in preparation for the attempt.

The advertisements for salesmen were so far removed from the execution or consummation of any possible offense of fraud that discussion of the point seems unnecessary, except that it shows the lengths to which the Government's theory would permit it to go. The advertisements constitute rather crude expressions from a person evidently meeting frustration in finding able salesmen (R. 29-30). Before such an advertisement could produce a fraud upon a victim, the following additional steps would be required: (1) response to the advertisement by a prospective salesman; (2) agreement upon terms and conditions of employment; (3) training of the new salesman and his acceptance of the procedures alleged to have been taught by defendants (R. 4-5); (4) a visit by the salesman to a prospect; and, finally, (5) the submission of defendants' proposal to render services, the making of false representations pertaining thereto, and the wrongful collection of money.

A mailing of the leaflet was likewise far removed from the commission of the offense of fraud. That the mailing of the leaflet constituted no part of an attempt to execute the fraud is indicated by the failure of the Government to refer to it in the indictment's highly detailed description of the wrongful conduct constituting the fraud or attempt. The leaflet contained no presentation of a proposition by the defendants and not one of the numerous misrepresentations to customers alleged in the indictment (R. 9-14). According to the indictment, the fraud was perpetrated, or the attempt was made, by means of numerous false representations made by the defendant salesmen in personal interviews with the victims. A mailing of the innocuous pamphlet, containing not one of the alleged moving misrepresentations, was too remote in time, place and causal relationship from the accomplishment of the fraud to constitute an attempt. Under the authorities which follow, such a mailing was not sufficient to constitute an attempt to defraud under State laws, and likewise it was not sufficient to be for the purpose of "attempting" to execute a fraud under the mail fraud statute.

To constitute an attempt to commit a crime, "whether statutory or at common law, there must be some overt act in part execution of the intent to commit the crime . . . . " 22 C.J.S. *Criminal Law*, § 75(2). Classical criminal law imposed the stringent requirement that a defendant must have passed the *locus poenitentiae*, the point of no return, only to be stopped by factors beyond his control before he could be convicted of attempt. We do not insist on such a test but rely rather on that prescribed by Holmes, C. J., in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 59 N.E. 55, 56:

> ". . . If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exercise of the will to complete the crime. . . . [T]he degree of proximity held sufficient may vary with the circumstances, including, among other things, the apprehension which the particular crime is calculated to excite."

But even under this more liberal view attempt requires very close proximity to the consummation of the crime. As stated in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 48 N.E. 770:

> "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near accomplishing that result before the law will notice it."

An attempt is committed when the acts approach the criminal objective "so near the result that, if coupled with an intent to produce that result, the danger is very great", and "there must be a dangerous proximity to success." *Hyde* v. *United States*, 225 U.S. 347, 387-88. Judge Learned Hand has pointed out that "*locus poenitentiae*" is an unsatisfactory criterion in so far as it divides "'attempt' from 'preparation' by the very instant of consummation," *United States* v. *Coplon*, 185 F. 2d 629, 633, but recognized that there is a crucial distinction between preparation and attempt. His yardstick is proximity, as discussed by Justice Holmes in *Peaslee, supra*, and *Kennedy, supra*.

Applying these principles to the present context, it is clear that there can be no attempt to obtain money by false pretenses unless false pretenses have been

made. We find no reported case in which a person has ever been charged with attempt to defraud where false representations had not been made,[18] and in some of these the conduct was held to fall short of an "attempt" even though false representations had been made.[19] Attempt requires at least that "some appreciable fragment of the crime be committed and the act must not be equivocal in nature." *People* v. *Buffum*, 40 Cal. 2d 709, 718, 256 P. 2d 317, 321.

In the case at bar, the essential parts of the execution of the fraud consisted of the presentation of the fraudulent proposition, the making of false representations pertaining thereto, and the wrongful extraction of money. All of these essential parts of the execution occurred in personal interviews some time after the preparatory mailings of the leaflets. The plan to defraud a particular victim had therefore not proceeded sufficiently close to consummation to reach the stage of attempt, and the mailings are not covered by the statute.

The law of attempt is not a technical and outmoded relic but serves the vital function of preventing pro-

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[18] See *e.g.*, *Lemke* v. *United States*, 211 F. 2d 73, *cert. denied*, 347 U.S. 1013; *People* v. *Anderson*, 55 Cal. 2d 655, 361 P. 2d 32; *People* v. *Camodeca*, 52 Cal. 2d 142, 338 P. 2d 903; *People* v. *Mayen*, 188 Cal. 237, 205 Pac. 435, overruled on a different point by *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 911; *People* v. *Wallace*, 78 Cal. App. 2d 726, 178 P. 2d 771; *People* v. *Arberry*, 13 Cal. App. 749, 114 Pac. 411 (Case 2); *People* v. *Reed*, 190 Cal. App. 2d 344, 11 Cal. Rptr. 780; *Parker* v. *State*, 29 Ga. App. 26, 113 S.E. 218; *State* v. *Visco*, 183 Kan. 562, 331 P. 2d 318; *State* v. *Howell*, 318 Mo. 772, 300 S.W. 807; *Commonwealth* v. *Evans*, 190 Pa. Super. 179, 154 A. 2d 57.

[19] *People* v. *Werner*, 16 Cal. 2d 216, 105 P. 2d 927, overruled on a different point by *People* v. *Camodeca*, 52 Cal. 2d 142, 338 P. 2d 903; *Nemecek* v. *State*, 72 Okla. Crim. 195, 114 P. 2d 492.

secutions for the mere formulation of a criminal intent. The continuing vitality of this principle appears vividly in Senate opposition to the broad language of the 1961 anti-racketeering statute as originally proposed, which would have permitted prosecution for merely using the mails or interstate transportation with a specified criminal intent.[20] This opposition resulted in an amendment requiring the performance of an act after interstate travel or use of the mails.

The only way in which the Government can hope to sustain the preliminary mailings as being within the statute is by creating confusion between the principles of attempt and the principles of conspiracy. This is what the Government seeks to do in its argument that the mailings were related to defendants' "long range preparation" and their "elaborate plan" (Brief for the United States, p. 17). In making these arguments, the Government rejects the rationale of *Kann* and *Parr* that the question of execution must be determined by reference to each fraudulent transaction, as evidenced by the Court's holding in both of these cases that the scheme was executed "as respects the transactions in question". By the same token, "attempt" must be determined by reference to each transaction.

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[20] *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 262 (1961).

> "*Senator Ervin:* . . . This act undertakes to make the crime evil intent rather than a bad act.
> "*Senator Carroll:* I want to say for the record I do not know of any place in criminal law where a man can just be prosecuted because he formulates an intent.
> "*Senator Kefauver:* Gentlemen, we spent about 3 hours on this yesterday, and we are going to have new language. *It is manifest that this present language is not satisfactory.*"

See also similar objections voiced at pp. 251-263.

Instead, the Government implicitly invokes the looser doctrine of conspiracy, where the essence of the crime is the agreement, and a very remote act in furtherance of the agreement is sufficient to be an "overt act". Thus, the Government hopes to avoid the stricter doctrine of attempt, which applies to substantive offenses. But, as Justice Holmes pointed out in *Hyde* v. *United States, supra:*

> "But combination, intention, and overt act may all be present without amounting to a criminal attempt,—as if all that were done should be an agreement to murder a man 50 miles away, and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offense. On the other hand, the essence of conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it to any degree." 225 U.S., at 387-88.

Some of the lower court decisions cited by the Government illustrate the success which the Government has sometimes had in the past in borrowing conspiracy concepts and terminology and applying these to the substantive offense of mail fraud. The result is that courts sometimes speak of a mailing as being "in furtherance of" a scheme (as the Government does in its brief in this case) and altogether lose sight of the stricter requirement of the mail fraud statute. The preliminary mailings relied on by the Government here illustrate how far the statute can and will be extended

unless the Government is limited to the restrictions expounded in *Kann* and *Parr*.[21]

The essence of the Government's argument is that each and every mailing made by the defendants in the course of their business was a Federal crime. The Government thus seeks to give the mail fraud statute a coverage equally as broad as that of the anti-racketeering statute adopted in 1961 which prohibits, among other things, use of the mails to "*facilitate* the promotion, management, establishment or carrying on" of any "unlawful activity"; and which defines "unlawful activity" as including "any business enterprise involving" untaxed liquor, narcotics and prostitution. Because of the reprehensible nature of these racketeering activities, Congress sought to use the broadest possible language consistent with minimum protection for the innocent. In the present case, however, without the benefit of the broad provisions of the anti-racketeering statute, the Government would have this Court hold that the strict requirement of the mail fraud statute that a mailing be "for the purpose of executing" a fraud may be so broadly applied as to prohibit any use of the mails to "facilitate" carrying on

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[21] Our research discloses two cases applying the mail fraud statute where the mailings unquestionably related to preparation only. *Goldman* v. *United States*, 220 Fed. 57 (6th Cir.); *Edwards* v. *United States*, 249 Fed. 686 (6th Cir.). In the *Edwards* case, the defendant used the mails to order certain raw materials which were made into drugs that were falsely labelled and fraudulently sold. In *Goldman*, the defendant used the mails to advertise for an assistant whom he hoped to persuade to assist him in an extortion racket. The two cases merely demonstrate the reach of the Government's theory and, under our theory, were wrongly decided.

"any business enterprise involving" fraudulent transactions. This position is surprising since, as previously noted, the Department of Justice advised the Senate Judiciary Committee that it did not desire the broad provisions of the anti-racketeering statute to cover fraud. (See page 30 above and Appendix, p. 47.)

B. The conspiracy count duplicates each so-called substantive count.

Our point here is that the group of persons indicted in each so-called substantive count goes so far beyond the limits prescribed by this Court in *Pinkerton* v. *United States,* 328 U.S. 640, and related cases, that each such count is in reality a conspiracy count, not a substantive count at all, and the indictment constitutes a flagrant pyramiding of conspiracy counts.

We recognize that each scheme to defraud participated in by two or more persons is a conspiracy, *Pinkerton* v. *United States,* 328 U.S. 640, 647; and that a participant in a conspiracy to commit a series of frauds can be punished for committing each of the frauds as well as for the conspiracy. *Pinkerton* v. *United States, supra; cf., Pereira* v. *United States,* 347 U.S. 1; *Nye & Nissen* v. *United States,* 336 U.S. 613. *Pinkerton* permits the inclusion of a conspirator in a substantive count, not strictly as an aider and abettor, but as a member of a criminal partnership in which "the partners act for each other in carrying it forward". 328 U.S., at 646. But, necessarily, in order for an accused to have such vicarious responsibility for the acts of his "partners", the "partnership" must encompass the substantive acts so that the accused may

be said to have contributed in some significant way to the commission of the offense.[22]

An individual salesman in the present case was in no sense a partner in the nationwide enterprise, either in respect to financial interest or responsibility. He worked on a "straight commission" and called on prospects whose names were furnished him (R. 29, 30). It is evident from the indictment that his financial interest and his responsibility were confined to the sales which he made or attempted to make; he did not participate in any planning or direction of the entire program, nor of any part of it beyond his limited area of responsibility. In this respect his position is different from that of the heads of the business and others who participated in the overall planning or were in the chain of responsibility with respect to each substantive offense that is charged.[23] A salesman would, of course, be includible in a substantive count where he made the sale or attempted to do so. He also could

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[22] This is the view expressed in a well developed note in the Harvard Law Review, *Developments in the Law—Criminal Conspiracies*, 72 HARV. L. REV. 920, 993-1000, where the extent and limitations of the *Pinkerton* doctrine are discussed. The authors state:

> "Even if there is a strong need for an attack on organized crime, the imposition of a penalty for conspiracy seems adequate to cope with this need, and it seems unjust to hold every member of a conspiracy equally culpable for a substantive offense regardless of the magnitude of his contribution to its commission. . . . " *Id.* at 999.

[23] We acknowledge that any person participating in the conspiracy at a decisional level could be indicted for each substantive offense committed anywhere in the United States. Mere absence from the scene of the crime would not affect his responsibility any more than it did in *Pinkerton*. But for a salesman in Florida, for example, there was both absence *and* lack of responsibility in a sale in Kentucky or California.

be included in a single conspiracy count, but not in forty-four conspiracy counts.

A reference to the indictment in this case will demonstrate that the so-called substantive counts do not meet the tests of *Pinkerton* and related cases, particularly in regard to the sixteen salesmen named in each such count. It would be stretching *Pinkerton* unreasonably to say that a salesman employed by defendant corporation to make fraudulent sales to selected victims in a certain area of the country was thereby guilty of each use of the mails to execute every fraud allegedly committed by the defendant corporation's employees anywhere in the United States during the entire three year period alleged in the indictment. The indictment would carry vicarious responsibility to the ultimate extreme of making a salesman responsible criminally for the employer's use of the mails in an effort to employ salesmen (Counts 40, 41).

The practical effect of this indictment would be to deny a salesman the opportunity of a fair trial. On the so-called substantive counts he could not confine his defense to a showing that there was no misrepresentation in any transaction in which he was the salesman. He must prepare to defend also against the frauds charged against other salesmen in other states and also against the "numerous and divers" other frauds alleged in the substantive counts. It would be for him a Pyrrhic victory if the defendants as a group were acquitted on a transaction in which he himself was the salesman but were then convicted on the 42 other so-called substantive counts on which he could be subjected to a maximum sentence of 210 years in prison, plus a $42,000 fine. He must therefore defend against forty-four mass conspiracy counts. For the

individual salesman the preparation of such a defense would be an impossible task which he would be forced to leave to the principal defendants. In a trial lasting many weeks, and even months, he could not possibly maintain an independent defense.[24] Such circumstances would force him to act as a mere pawn with little chance that the jury could separate his activities and his agreements from the mass.

The indictment drawn in this case places in the prosecutor's hands a tactical weapon of frightening proportions. It raises questions which are particularly grave if the indictment represents not a mere sport in a particular case, but, as we fear, a considered effort by the prosecuting arm of the Federal Government to extend its use of conspiracy charges. This Court has previously recognized the dangers of abuse inherent in charges of conspiracy and we trust that it will disapprove the practice reflected in this case. *Grunewald* v. *United States,* 353 U.S. 391; *Pinkerton* v. *United States,* 328 U.S. 640, 644, n. 4; *cf., Krulewitch* v. *United States,* 336 U.S. 440, 449, 451; *Nye & Nissen* v. *United States,* 336 U.S. 613, 625-27. In *Grunewald,* the court stated:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets

[24] For one thing, he would not know what to defend against. On the "substantive" counts involving transactions in which he did not participate, the individual salesman could not know in advance whether his case would go to the jury on the theory of aiding and abetting or on the theory of conspiracy, or both. Moreover, in a mass trial with these multiple counts, the jury, even with the clearest charge, would very probably be unable to divine the true issue and the facts pertinent to his particular defense. An independent effort to defend himself would seem futile.

> of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch* v. *United States, supra.*" 353 U.S., at 404.

It would be harsh and callous for the Government to answer that the trial judge, after a long and costly trial, could direct an acquittal for the individual salesman on every so-called substantive count where it was not shown that the salesman participated as an aider and abettor. Counsel for the defendants sought by motion for a bill of particulars to get from the prosecution the few essential facts which would permit this separation to be made before trial (R. 62-63), but the Government refused to divulge the information and was upheld by the district court (R. 63). Thus, the Government has elected to stand on the so-called substantive counts as they were drawn and was not willing by a bill of particulars to provide the few essential facts which would have permitted the court in effect to reduce each mass conspiracy count to a substantive count. Since the Government has thus elected to stand on these counts as drawn and since each such count as drawn is merely a mass conspiracy count, they are duplicative of each other and of the conspiracy count.

The action of the district court in dismissing the conspiracy count was proper so far as it went, but it provided only partial relief. Since the Government chose to stand on all counts as drawn, and since they are all mass conspiracy counts, all but one should have been dismissed on the grounds of duplication. The one remaining count should be upheld only if it otherwise charges a conspiracy to violate the mail fraud statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court dismissing 34 of the substantive counts and the conspiracy count should be affirmed.

Respectfully submitted,

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APPENDIX

In the hearings before the Senate Judiciary Committee on S. 1653, a part of the 1961 "anti-racketeering" legislation, Senator Keating referred to the fact that he had previously introduced a bill, S. 710, which was similar to, but in some respects broader than, the pending Department of Justice proposal.[25] Senator Keating's bill would have made it a crime to conspire "to commit any organized crime offense against any of the several states" where any overt act to effect the object of the conspiracy consists of use of the mails or facilities of interstate transportation or communication. *This bill specifically included within the definition of "organized crime offense" any offense relating to "criminal fraud or false pretenses".* Mr. Herbert J. Miller, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, appeared before the Committee and was questioned by Senator Keating regarding the desirability of the broader coverage provided by Senator Keating's bill, S. 710. Mr. Miller replied:

> "Senator, let me answer your question in this way:
> "There is the practical problem, which I will put to one side, as you suggest.
> "The other problem is basically, perhaps, a philosophical one, and that is how far the Federal Government should go in this particular field.
>
> "There are some who would feel, I think, perhaps, that if you put one more criminal violation in, you are going too far. . . . "

Shortly after this statement, the following exchange occurred specifically relating to the desirability of broadening the statute to cover fraud.

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[25] *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 94 (1961) (hereinafter cited as "*Hearings*"). S. 710 is reproduced at *Hearings*, 95-96.

"*Senator Keating:* Or would you object to broadening it—you probably would object to broadening it—to include frauds generally, wouldn't you?

"I must differentiate.

"Perhaps not you personally, because you have said you personally would not object to the provisions of S. 710 but would you think, speaking in your official capacity, that there would be objection to broadening it, if S. 710 was not enacted to cover such things as fraud and criminal assault?

"*Mr. Miller:* I would have one field of hesitancy, Senator, in broadening it, for this reason:

"This bill as it now stands is really aimed at what we call organized crime today. When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offense[s], then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government.

"Now, fraud as a practical matter is not normally the type of crime that you associate with organized crime. . . ." *Hearings,* 113.

The next day, Mr. Miller touched on this question again in response to the comment of Senator Carroll that "this concept could be broadened across the board to any crime".

"*Mr. Miller:* It could be, yes. It could be broadened to any crime. Frankly, that is why we limited it to the four where we felt that there was a serious problem.

"*Senator Carroll:* I am not only thinking, Mr. Miller, of today's necessity; I am looking into the future 2 years, 4 years, 10 years.

"*Mr. Miller:* Unquestionably, conceivably in the future, again I assume a need would be shown, this concept could be expanded." *Hearings,* 261.

As Mr. Miller himself suggested, if need existed for the expansion of Federal jurisdiction over fraud, beyond existing limitations as indicated in *Kann* and *Parr*, Congress would no doubt respond to the extent clearly required to meet the demonstrated need. For example, earlier in the Senate hearings just referred to, the Attorney General referred to *France v. United States*, 164 U.S. 676, as indicating a need for broader legislation relating to lotteries. *Hearings*, 8. In the *France* case, transportation of certain lottery documents after the conclusion of a particular lottery drawing was held not within the scope of 18 U.S.C. § 1301 (even though the particular drawing was one of a series occurring twice daily). The Court held:

> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. . . . If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation." 164 U.S. 682-83.

At the request of the Attorney General, Congress subjected lottery activities to the broader coverage of 18 U.S.C. § 1952 (Supp. III 1962).